...E COURT, U. S.

FILED
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JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~1162~~ 9

JOHN EL STONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

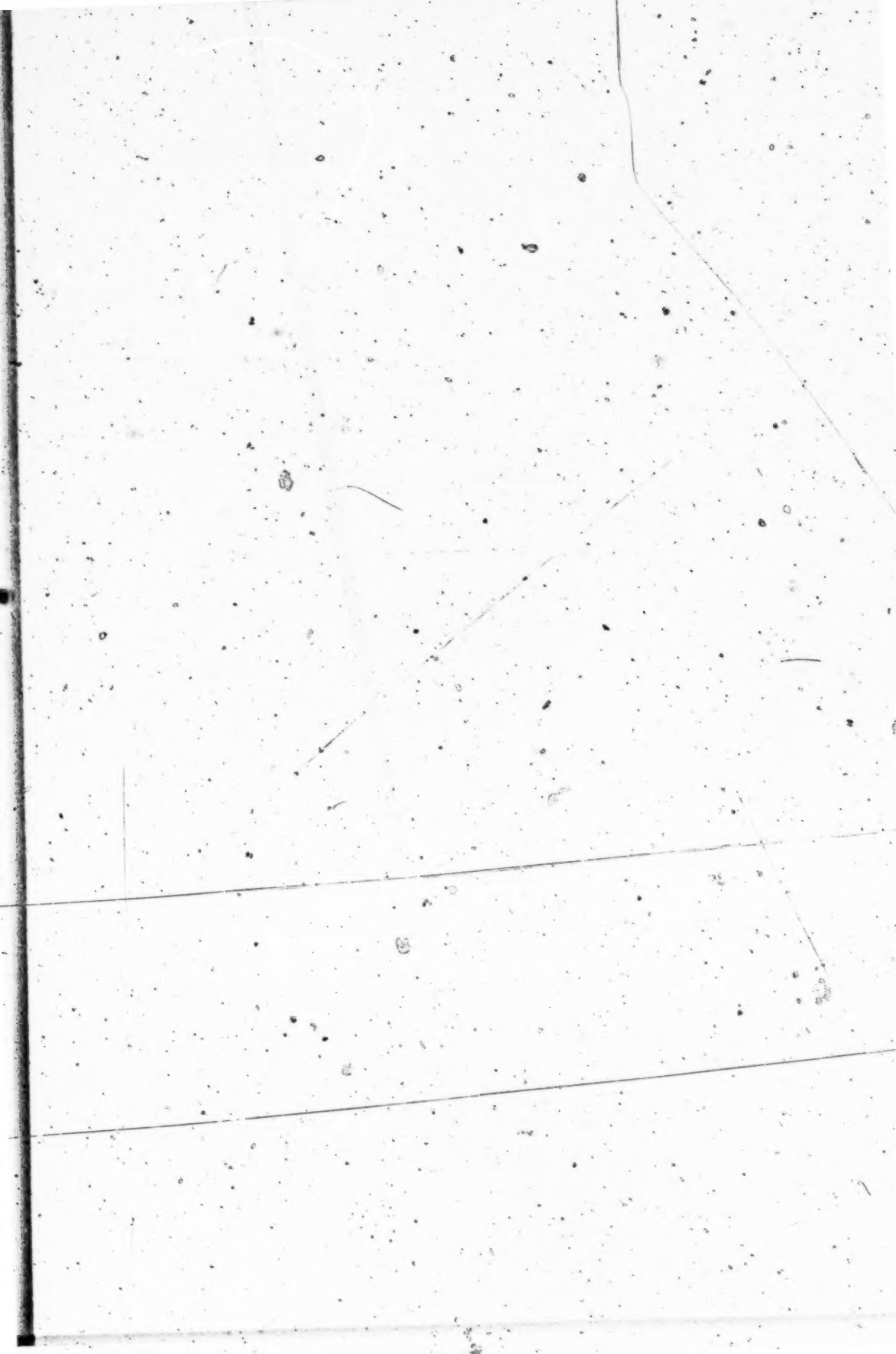
Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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OCTOBER TERM, 1966

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UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on March 4, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals, printed in Appendix B, is unreported at this time.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 4, 1966. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether the registration and tax provisions of the federal wagering tax laws violate Fifth and Fourteenth Amendments privileges against self-incrimination.

STATUTES INVOLVED

The statutory provisions involved are 18 U.S.C., Sections 371, 1084, 1952, 1953; 26 U.S.C., Sections 4411, 4412, 4901, 7203. They are printed in Appendix A, infra, pp. 9.

STATEMENT

Petitioner appealed from a judgment of conviction in the Federal District Court entered on six Counts of an indictment after a trial by the Court without a jury; Petitioner having waived a jury trial. Count I charged Petitioner with violating 26 U.S.C., Section 7203, by accepting wagers during the period October 1, 1962, through June 30, 1963, without having paid the special occupational tax imposed by 26 U.S.C., Section 4901. He was sentenced to 60 days in prison and fined One Thousand Dollars ($1,000.00) each on convictions under Counts IV, VII, X, XV, and XVI, the sentences of probation to run concurrently. The remainder

of the 16 Counts in the indictment were returned against Petitioner's Co-Defendants who did not appeal. Count IV charged Petitioner with the violation similar to that charged in Count I for the period October 1, 1961, through June 30, 1962. Counts VII and X charged him with violating 26 U.S.C., Section 7203, by accepting wagers during certain periods without having registered as required under 26 U.S.C., Section 4412. Count XV charged all three of the Defendants with violating 18 U.S.C., Section 371, and Section 7203, supra, by conspiring to conduct a business of accepting wagers without first paying the special occupational tax. Count XVI charged the Defendants with violating Section 7203 by failing to make excise tax returns on taxes due under 26 U.S.C., Section 4401. Counts XIII and XIV, charging Petitioner with violations of 18 U.S.C., Section 1084, were dismissed by the government as were other Counts relating solely to the Co-Defendants.

REASONS FOR GRANTING THE WRIT

Four assignments of error were projected to the Court below and the cause was affirmed, as reflected by the Court's opinion in Appendix B, infra. Only one of such issues is raised herein.

The decision of the Court below in the instant case is in conflict with the principles expressed in a controlling decision of this Court in *Albertson v. S.A.C. Board*, ... U.S.

....., 15 L. Ed. 2d 165, decided November 15, 1965. The issue as to whether or not the registration and tax provisions of the federal wagering tax laws violate Fifth Amendment privilege against self-incrimination is presently pending in this Court by petition for certiorari filed January 26, 1966, in *Moretti v. United States*, No. 951, 34 L. W. 3308, among other petitions pending.

It is Petitioner's contention that the registration and occupational tax provisions of Sections 4411 and 4412 of Title 26 U.S.C., require that he supply the United States Treasury Department with information concerning his alleged projected gambling activities and as a consequence provides a "link in a chain of evidence" to convict him under Sections 1952, 1953, and 1084, of Title 18 U.S.C., and his preparatory activities, as well as providing such evidence under Texas penal statutes concerning gambling, are in violation of his Fifth and Fourteenth Amendment privileges.

Section 4411 and the regulations filed thereunder require that Form 11-C (Appendix C) be submitted to the United States Treasury Department and that payment of the occupational tax on wagering required by Section 4411 and the registration required by said Section 4412 may tend to incriminate Petitioner of violations under 18 U.S.C., Sections 1084, 1952, 1953, and State gambling laws.

Petitioner is aware that Sections 4411 and 4412, and similar predecessor sections of the Internal Revenue Code of 1939,

have heretofore been attacked on the grounds that the registration constituted a compulsory disclosure of incriminating evidence. The validity of predecessor registration sections was upheld in *United States v. Kahriger*, 345 U.S. 22, on the theory that the Fifth Amendment would not be applied to prospective unlawful acts and that the required form was prior to the unlawful activity of the Defendant. 345 U.S. 22, at pp. 32-33. The rationale of *Kahriger* and *United States v. Sullivan*, 274 U.S. 259, was followed in *Lewis v. United States*, 348 U.S. 419. However, since the passage of 18 U.S.C., Sections 1084, 1952, and 1953, such passage places the subject registration provisions in a perspective different from that reviewed by this Court in *Lewis* and *Kahriger*. 67 Harv. L. Rev. 166 (1953). While the registration provisions on the occupational tax on wagering may not incriminate one of gambling, in which he intends to engage, it may well be a "link in a chain of evidence" to convict him of interstate travels preliminary to actual acceptance of wagers. Indeed, a Defendant who has travelled in interstate commerce with the intent of promoting a gambling enterprise and who thereafter registers pursuant to the provisions of said Sections 4411 and 4412, may well have thereby committed the overt act in furtherance of this activity required by 18 U.S.C., Section 1952(a)(3), and for all practical purposes have convicted himself thereunder. The interstate aspect when engaged in the business of wagering and betting, and its connection with past con-

duct and present status, is pointed up by the allegations of this indictment in Counts XIII and XIV under 18 U.S.C., Section 1084. Form 11-C, required by said Section 4412 is not the type of form discussed by Mr. Justice Holmes in *Sullivan*. The very act of signing this form supplies the incriminating evidence under the said Section 1952. It is the kind of form which could be filed with such answers omitted as might be incriminating to the signer.

The distinction between registration forms, part of which may be submitted with impunity and thus which in themselves may tend to incriminate, was forecast in *Communist Party v. S.A.C. Board*, 367 U.S. 1, at p. 109. A Comparison of Form 11-C and Form IS-52, which this Court was concerned with in *Albertson*, was discussed by the Court below in its opinion stating that it must be admitted that the language in *Albertson* directed to Form IS-52 does bear very closely on the problem presented in requiring gamblers to register and pay the special tax. It is the Petitioner's contention that the holding below, that *Albertson* in no way impinges upon the privilege against self-incrimination rules of *Kahriger* and *Lewis*, is incorrect and in conflict with the principles of *Albertson*. The question presented is of special importance in the administration of the Internal Revenue Code and the self-incrimination web of the anti-racketeering statutes. The gradual encroachment upon the self-incrimination rights of Petitioner through the expanded

informational form, now 11-C, and the present statutory scheme, when coupled with this Court's decision of *Malloy v. Hogan*, 378 U.S. 1, presents a factual situation not anticipated nor reviewed by this Court in *Kahriger* and Lewis.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, EMMETT COLVIN, JR., one of the attorneys for John El Stone, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ....th day of March, 1966, I served one copy of the foregoing Petition for Certiorari on the United States Attorney, B. H. Timmons, Jr., representing the Respondent, United States of America, as follows:

Honorable B. H. Timmons, Jr.
Asst. United States Attorney,
Federal Court House, Dallas, Texas,

by mailing a copy in a duly addressed envelope, postage prepaid, to the above party at the address so indicated.

.....

EMMETT COLVIN,
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Dallas, Texas 75202.

APPENDIX A

STATUTES INVOLVED

Title 26, U.S.C.A., Section 4401; Imposition of tax

(a) Wagers—There shall be imposed on wagers, as defined in Section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

Title 26, U.S.C.A., Section 4411; Imposition of Tax

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

Title 26, U.S.C.A., Section 4412; Registration

(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

Title 26, U.S.C.A., Section 4901; Payment of tax

(a) Condition precedent to carrying on certain business. —No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wager-

ing), 4461(2) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marhuana) until he has paid the special tax therefor.

(b) Computation.—All special taxes shall be imposed as of on the first day of July in each year, or on commencing former case the tax shall be reckoned for 1 year, and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

(c) How paid.—

(1) Stamp.—All special taxes imposed by law shall be paid by stamps denoting the tax.

(2) Assessment.—For authority of the Secretary or his delegate to make assessments where the special taxes have not been duly paid by stamp at the time and in the manner provided by law, see subtitle F.

Title 26, U.S.C.A., Section 7203; Wilful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who wilfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misde-

meanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Title 18, U.S.C.A., 371; Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to affect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, U.S.C.A., Section 1084; Transmission of wagering information; penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

Title 18, U.S.C.A., Section 1952; Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in sub-paragraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Title 18, U.S.C.A., Section 1953; Interstate transportation of wagering paraphernalia

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel material used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

APPENDIX B

In the

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21977

JOHN EL STONE, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Northern District of Texas

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(March 4, 1966.)

Before JONES,* Senior Judge and GEWIN and BELL, Circuit Judges.

BELL, Circuit Judge: This appeal is from a judgment of conviction entered on six counts of an indictment after a

* Of the Court of Claims, sitting by designation.

trial by the court without a jury. Appellant waived jury trial. The indictment was in sixteen counts and was returned against appellant, James Woodrow Stone and Isadore Miller.

Count I charged appellant with violating 26 U.S.C.A., §7203 by accepting wagers during the period October 1, 1962 through June 30, 1963 without having paid the special occupational tax imposed by 26 U.S.C.A., §4411 and due under 26 U.S.C.A., §4901. He was sentenced to sixty days in prison and fined $1,000 on this count. He was placed on probation for three years and sentenced $1,000 each on convictions under Counts IV, VII, X, XV, and XVI, the sentences of probation to run concurrently. Count IV charged for the period October 1, 1961 through June 30, 1962. Counts VII and X charged him with violating 26 U.S.C.A., §7203 by accepting wagers during certain periods without having registered as required under 26 U.S.C.A., §4412. Count XV charged all three of the defendants with violating 18 U.S.C.A., §371, and §7203, supra, by conspiring to conduct a business of accepting wagers without first paying the special occupational tax. Count XVI charged them with violating §7203 by failing to make excise tax returns on taxes due under 26 U.S.C.A., §4401. Counts XIII and XIV were dismissed by the government, and the other counts related solely to James Woodrow Stone or Isadore Miller.

There are four assignments of error. Each of the counts in issue are said to be invalid in that the registration and special occupational tax statutes, 26 U.S.C.A., §§4411, 4412 and 4901 compel disclosures which would incriminate the

registrant in view of the criminal provisions of 18 U.S.C.A., §§1952, 1953 and 1084,[1] and the penal provisions of the State of Texas against gambling. Consequently, it is argued they are violative of appellant's constitutional privilege under the Fifth Amendment. It is urged that the District Court erred in overruling the motion for judgment of acquittal on this ground. The other three assignments question the sufficiency of the evidence.

The self incrimination argument as respects the penal provisions of the state law was put to rest by the Supreme Court in *United States v. Kahringer*, 1952, 345 U.S. 22, 73 S. St. 510, 97 L. Ed. 754. The constitutionality of the registration provision was upheld for the reason that the Fifth Amendment applies only to past conduct and the registration provision was construed as applying to future conduct. In *Lewis V. United States*, 1954, 348 U.S. 419, 75 S. Ct. 415, 99 L. Ed. 475, federal laws against gambling in the

[1] Section 1084 prohibits the transmission of bets or wagers by a wire communication facility in interstate or foreign commerce. Section 1952 prohibits travel in interstate or foreign commerce or the use of any facility therein, including the mail, for unlawful activity. Unlawful activity is described in §1952(b) as:

> "As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

Section (a) requires the travel or use of the facility be with intent to distribute the proceeds of an unlawful activity, or to commit a crime of violence to further unlawful activity, or otherwise to promote or carry on any unlawful activity, and contains the requisite that one of these acts be thereafter accomplished or performance attempted.

Section 1953 makes it unlawful to sent or carry records, tickets, etc. used in betting or wagering in interstate or foreign commerce.

District of Columbia were said to give rise to the self incrimination claim but the Supreme Court followed the reasoning of *Kahringer* and again affirmed. These authorities are subsisting and binding on this court. But, appellant argues, 18 U.S.C.A., §§1952, 1953 and 1084, Footnote (1), supra, making specified interstate gambling activities unlawful, have been enacted in the interim and they render the reasoning of the Supreme Court in *Kahringer* and *Lewis* inapplicable.

The argument is that the registration, provision may serve a "link in a chain of evidence" to convict one of past interstate gambling activity under these statutes. The fallacy in this argument is that we do not have such a case. This prosecution is not brought under these interstate gambling activity statutes, and thus we are not presented with a question of evidence of registration and payment of the special occupational tax having been admitted to prove a charge of either prior or subsequent illegal conduct. Cf. *United States v. Zizzo*, 7 Cir., 1964, 338 F. 2d 577, cert. den., 381 U.S. 915, 14 L. Ed. 2d 435, where a registration and an occupational tax return were held admissible in a prosecution brought under 18 U.S.C.A., §1952. There the registration and return preceded the enactment of §1952.

The constitutionality of the registration and occupational tax provisions was upheld in the face of these new interstate gambling activity statutes in *United States v. Cefalu*, 7 Cir., 1964, 338 F. 2d 582, citing *United States v. Zizzo*, supra, as authority. This view was reaffirmed by the Seventh Circuit in *United States v. Altiere*, 7 Cir., 1964, 343 F. 2d

115, vacated by Supreme on other grounds, 34 L. W. 3242; and *United States v. Angelini*, 7 Cir., 1965, 346 F. 2d 278. See also *United States v. Costello*, 2 Cir., 1965, 352 F. 2d 848.

Appellant relies on *Albertson v. Subversive Activities Control Board*, ... U.S. ....., 86 S. Ct. ....., 15 L. Ed. 2d 165. There the selfincrimination which made the Fifth Amendment privilege applicable was based on past conduct. The Court said:

> "The risks of incrimination which the petitioners take in registering are obvious. Form IS-52a requires an admission of membership in the Communist Party. Such an admission of membership may be used to prosecute the registrant under the membership clause of the Smith Act, 19 U.S.C. §2385 (1964 ed.), or under §4(a) of the Subversion Activities Control Act, 50 U.S.C., §783(a), (1964 ed.), to mention only two federal statutes * * * It follows that the requirement to accomplish registration by completing and filing Form IS-52a is inconsistent with the protection of the Self-Incrimination Clause."

The Court also concluded that Form IS-52 violated the Self-Incrimination Clause for the reason that the information called for in it "* * * might be used as evidence in or at least supply investigatory leads to a criminal prosecution." Registration by a Communist under either form would disclose past conduct subject to prosecution.

On the other hand, it is clear that the *Kahringer* and *Lewis* holdings as they relate to the Fifth Amendment are founded on a future conduct concept as distinguished from past conduct which is the basis for the privilege. A person

may or may not gamble after registering, according to his own volition. It must be admitted that the language in *Albertson* directed to Form IS-52 does bear rather closely on the problem presented in requiring gamblers to register and pay the special tax. Form IS-52 was a supplement to Form IS-52a and required the name of the Communist-action organization of which registrant was a member within the preceding twelve months, the name of the registrant, all other names used by registrant during the past ten years, date of birth, place of birth, residence and business address, offices held in the Communist-action organization, and a description of the duties and functions performed during the tenure of office. On balance however, we think it clear that this information which the Supreme Court described as being of the type that "* * * might be used as evidence in or at least supply investigatory leads to a criminal prosecution", applies to past conduct and for that reason falls in the category with Form IS-52a.

Thus, *Albertson* in no way impinges on the privilege against self-incrimination rulings of *Kahringer* and *Lewis* which are limited to future conduct situations. Our view that these cases were in no way disparaged by *Albertson* is buttressed by the fact that neither case is cited in *Albertson*. Being of this view, it follows that the District Court did not err in denying the motion to acquit on the constitutional ground.

Appellant further contends that the evidence was insufficient to show that he had knowledge of the duties imposed by the wagering tax statutes in question. In so do-

ing he seeks to show that the willfulness requirement of the statute has not been met. There was evidence from several persons that they placed bets with appellant over a course of time ranging from one to ten years. There was evidence that in 1961 appellant refused to accept a bet offered by telephone from the State of Missouri at which time he said that "* * * since they had passed this new law he didn't accept wagers over the state line". This established appellant's general familiarity with laws pertaining to gambling, and was a sufficient base for an inference beyond a reasonable doubt that appellant had knowledge of the duties imposed on him by the Wagering Tax stautes. *Edwards v. United States*, 5 Cir., 1964, 334 F. 2d 360.

The remaining contents of insufficiency of evidence to convict on Counts XV and XVI are without merit. The proof on these counts was ample.

AFFIRMED.

APPENDIX C

FORM 11-C
Rev. July 1963

U.S. Treasury Department—Internal Revenue Service

SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING.

(See Instructions on reverse for time and place for filing return)

Return for period from ..... **to June 30, 19**.....
(Month, day, and year)

Check one: ☐ First return and application ☐ Renewal return and application ☐ Supplemental return and application

For District Director's Use Only

(Stamp number) .....

(Date issued) .....

(Registration number) .....

Tax ..... $.....
Penalty ..... $.....
Interest ..... $.....
Total ..... $

1. Name: True name .....

Alias, style, or trade name, if any .....

2. Address: Residence .....
(Number and street)

(City) (County) (State)

Business .....
(Number and street)

(City) (County) (State)

3. If this is a supplemental application, please explain and give your Special Tax Stamp No. and Registration No. (see instruction 2)

Make remittance payable to the Internal Revenue Service. Payment may be made by cash, check or money order.

(If additional space is required for items 4, 5 (a), 5 (c), or 6, attach additional sheets, identifying each entry as to item number.)

4. If taxpayer is a firm, partnership, or corporation, give true name of members or officers.

True name	Title	Home address

5. Are you or will you be engaged in the business of accepting wagers on your own account? ☐ Yes ☐ No (Check one)

If yes, complete (a), (b), and (c) of this item.

(a) Name and address where each such business is or will be conducted.

Name of location	Street address	City and State

(b) Number of employees and/or agents engaged in receiving wagers on your behalf .....

(c) True name, current address, and special tax stamp number of each such person.

True name	Special stamp No. in present use	Street address	City and State

6. Do you receive or will you be receiving wagers on behalf of or as agent for some other person or persons? ☐ Yes ☐ No (Check one)

If yes, give true name and address of each such person.

True name	Street address	City and State

SIGNATURE AND VERIFICATION

I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete.

..... , 19.....
(Date)

.....
(Signature)

.....
(State whether individual owner, member of firm, or if corporation officer, give title)

INSTRUCTIONS

1. **Who Must File.**—Every person who is liable for the 10-percent excise tax imposed by section 4401 of the Internal Revenue Code, and every person who is engaged in receiving wagers for or on behalf of any person so liable, is subject to a special tax of $50 per year imposed by section 4411 of the Code, and must file Form 11-C.

Section 4421 of the Code defines the term "wager" to mean (1) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (2) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (3) any wager placed in a lottery conducted for profit.

The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (1) the wagers are placed, (2) the winners are determined, and (3) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under sections 501 and 521 of the Code, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

2. **When To File.—(a) First and Renewal Returns and Applications for Registry**—Form 11-C serves two purposes: (A) A special tax return and (B) an application for registry. The first return and application for registry must be filed prior to engaging in the activity which results in liability for the special tax on wagering. Renewal returns and applications are required to be filed on or before July 1 of each year thereafter during which taxable activity continues. Changes in ownership which require a return and application for registry, and which result in special tax liability, include the following:

(1) Admission of new members to a firm or partnership.

(2) Formation of a corporation to continue the business of a partnership.

(3) Continuance of the corporate business by a stockholder after the corporation is dissolved.

(b) Supplemental Applications for Registry.—Change of place of business or residence address must be registered with the District Director of Internal Revenue by filing a Form 11-C and checking the block designated "Supplemental Return and Application," stating the new address and the date of change before (i) he engages in any wagering activity at the new address, or (ii) the termination of a 30-day period which begins on the day after the date of such change, whichever occurs first. Any other change must also be registered within 30 days after such change; examples of such other changes include the following: (1) Continuance of the operation of a business of a deceased person, who has paid the special tax, by the surviving spouse or child, or executor or administrator, or other legal representative, (2) Continuance of a business by a receiver or trustee in bankruptcy, (3) Continuance of a business by an assignee for the benefit of creditors, (4) Withdrawal from a firm or partnership of one or more members, and (5) Mere change of corporate name. Failure to comply with these requirements will result in additional tax and penalty. The taxpayer's special tax stamp shall accompany such supplemental application for proper notation by the District Director.

An individual accepting wagers on his own account shall register, by filing a Form 11-C designated "Supplemental Return" not later than 10 days after engaging a new agent or employee to receive wagers, the name, address, and number appearing on the special tax stamp of each such agent or employee. Likewise, an agent or employee receiving wagers on behalf of another shall register the name and address of each additional person by whom he is engaged to receive wagers within 10 days after he is so engaged.

3. **Where To File.**—The return must be filed with the District Director of Internal Revenue for the district in which is located the taxpayer's office or principal place of business or, if he has no office or principal place of business in the United States, with the District Director for the district in which he resides. If the taxpayer has no office, residence, or principal place of business in the United States, the return must be filed with the District Director of Internal Revenue, Baltimore, Maryland, 21203.

4. **Computation of the Special Tax on Wagering.**—Special tax liability is computed from the first of July of each year, or the first day of the month during which business is commenced, to the thirtieth day of June following. Where business is begun after the month of July, the tax to be remitted is computed by multiplying the monthly rate of $4.16⅔ by the number of months remaining in the fiscal year. If the resulting amount involves a fraction, the full cent must be included. Example: If a person first commences business in November, liability should be computed as follows: $4.16⅔×8 (the number of months remaining in the fiscal year) equals $33.33⅓, or $33.34, the amount to be remitted.

5. **Penalties.**—If the return is not filed with the District Director prior to engagement in the activity which results in liability for the occupational tax on wagering, the penalty prescribed by sections 6651 and 6653 of the Internal Revenue Code may be incurred. In addition, under the provisions of section 7262 of the Code any person who does any act which makes him liable for the special tax, without having paid such tax, shall be fined not less than $1,000 and not more than $5,000. Section 7273 (b) provides that any person who fails to post or exhibit special wagering tax stamps in accordance with section 6806 (c) shall be liable to a penalty of $50 if failure to comply is due to negligence or $100 if due to willful neglect or refusal. For willful failure to file a return or pay the tax, the penalties under sections 7201 and 7203 may be imposed. Under the general provisions of section 1001 of Title 18 of the United States Code, whoever knowingly makes any false or fictitious statement with respect to the payment of the special tax, such as the giving of a false name or address, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1963—O-691-656

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1162

JOHN EL STONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a trial without a jury, petitioner was convicted on six counts of an indictment charging violations of 26 U.S.C. 7203. Counts 1 and 4 charged that he willfully failed to pay the occupational tax required by 26 U.S.C. 4411; counts 7 and 10 charged that he willfully failed to register as required by 26 U.S.C. 4412; count 15 charged conspiracy to conduct a wagering business without paying the occupational tax; and count 16 charged that he and two others who owed an excise tax on wagers imposed by 26

U.S.C. 4401 willfully failed to file a return. The court sentenced petitioner to sixty days in prison and fined him $1000 on count 1. He was placed on probation and fined $1000 on each of the other counts, the sentences of probation to run concurrently.

Petitioner claims that Section 4411 and 4412 of Title 26 violate the privilege against self-incrimination. Since this issue is before this Court in *Costello* v. *United States*, No. 826, certiorari granted, March 21, 1966, we suggest that it would be appropriate to defer action on the instant petition pending disposition of the *Costello* case. However, count 16 based on failure to pay the excise tax is unaffected by these considerations.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

APRIL 1966

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 214512 749

JUL 11 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~330~~ 14

RALPH CONTI and DAVID NEWMAN,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM T. GRIFFIN,
44 Wall Street,
New York, N. Y.,
Counsel for Petitioners.

Dated New York, July 8, 1966.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

RALPH CONTI and DAVID NEWMAN, Petitioners,

against

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Ralph Conti and David Newman, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 1, 1966.

Opinion Below

The opinion of the Court of Appeals, as yet unreported, is printed as Appendix A annexed to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on June 1, 1966. Petitioners' timely petition for rehearing was denied on June 28, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 22(2).

Questions Presented

1. Do not the federal wagering tax statutes here involved violate the petitioners' privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this Court especially in view of its recent decision in *Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70, overrule *United States* v. *Kahriger,* 345 U. S. 22 (1953), and *Lewis* v. *United States,* 348 U. S. 419 (1955)?

This is the question on which this Court recently granted certiorari in *United States* v. *Costello,* 352 F. 2d 848 (2d Cir. 1965), cert. granted 383 U. S. 942 (1966), 86 S. Ct. 1195.

2. Is the search warrant valid where, as here, it charges only a violation of 26 U.S.C. § 7272, i.e., a failure to register under the federal wagering statute, 26 U.S.C. 4412, and where the sole supporting affidavit sets forth reasons for believing only that there was a failure to pay the special occupational tax (i.e., a violation of 26 U.S.C. § 7271, for failure to comply with 26 U.S.C. § 4411), but does not mention any grounds for believing that there was a failure to register?

3. Is the search warrant valid where those parts of the supporting affidavit dealing with (i) investigation of a telephone number used for taking bets and (ii) search of the Internal Revenue Service records for proof of non-payment of the occupational stamp tax, are hearsay, and no source of the information is stated and no date is given as of when the investigation or the search was made?

4. Does the supporting affidavit for the search warrant state sufficiently, or at all, the dates when the horse bets were placed over the telephone?

5. May the fruits of a search be used to convict where the federal agents in executing a warrant to search a street floor apartment in a multiple dwelling, did so by opening and entering through the street door of the building, going through the vestibule, opening and entering through the

vestibule door, going into and through a hallway to the rear of the ground floor opposite the apartment, and then trespassing by opening the door to a landing at the head of a stairway leading to the cellar, entering upon the landing and concealing themselves there behind the door? The landing, the cellar stairs and the cellar were not accessible even to tenants of the building and the door was customarily kept locked.

6. Was 18 U.S.C. § 3109 violated where, at the moment petitioner Conti opened the door of the apartment, the agents rushed from their above-described place of concealment behind the cellar stairway door, and while shouting "Federal Agents with a search warrant," continued full speed without any pause at all past Conti through the open door into the apartment?

Constitutional and Statutory Provisions and Regulations Involved

Question 1 involves the Fifth Amendment of the United States Constitution and the wagering tax laws 26 U.S.C. §§ 4401, 4411, 4412, which are set forth in Appendix E at pp. 40-41 below.

Question 2 involves the Fourth Amendment of the United States Constitution and two of the above wagering tax laws, namely, 26 U.S.C. §§ 4411 and 4412 and also 26 U.S.C. §§ 7271 and 7272 and Federal Tax Regulations 26 C.F.R. 44.4412-1, 44.6071-1(b)1, 44.6151-1, and 44.4901-1(a) and (c). These are set forth in Appendix E at pp. 40-45 below.

Questions 3 and 4 involve the Fourth Amendment of the United States Constitution, and Rule 41(e)(2) of the Federal Rules of Criminal Procedure, which are set forth in Appendix E, at pp. 40 and 45 below.

Questions 5 and 6 involve 18 U.S.C. § 3109 and Rule 41(e)(5) of the Federal Rules of Criminal Procedure, which are set forth in Appendix E at pp. 40 and 45 below.

Statement of the Case

(Numerals followed by the letter "a" are page references to petitioners' appendix below, certified to this Court)

Federal special agents conducted a surveillance covering Apartment B, 1582 First Avenue, New York City, on January 20 and 21, 1964.* On January 22, 1964, Special Agent, David A. Ostrager (who had not participated in the surveillance) obtained from U. S. Commissioner

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* The apartment in question, Apartment B, was in the rear of the ground floor of a modernized apartment building, between 81st and 82nd Streets, New York City. An unlocked door led from the street into a first hallway which contained mail boxes, bells and an inter-com system which connected to the various apartments. A second door led into an inner hallway. This door was locked and could only be opened by a key or a push-button buzzer released by a tenant (148a). The managing agent had given orders that this door leading to the inside hall should be kept locked at all times (151a).

At the rear of the ground floor hallway, about four feet from the door of Apartment B, and almost facing it, was another door at the head of a flight of steps, leading to the cellar. This door was regularly kept locked and even tenants had no right of access to the stairway or cellar (151a).

Each tenant had a key to the inner vestibule door in addition to the key to his apartment. The vestibule door was locked when the agents first approached it on January 20th, 1964, but Agent Cotter managed to enter it behind one of the tenants (124a). On and after January 21, 1964, Agent Riley used his own keys to open it (108a-109a).

The inner halls and stairways were for the exclusive use of the tenants in the building and their guests or others with authorized business. The agents entered the inner hallways solely for the purpose of surveillance. They were not invitees or even permittees. They disclaimed all contact with the superintendent, the owner or any other person who might have given them permission to enter (111a). During the three days of this investigation, January 20 to 22, 1964, the agents stayed for long periods of time on the landing behind the door at the head of the cellar steps, with the door at times open one-eighth of an inch to a quarter of an inch. They listened at the door of Apartment B for telephone calls and physically affixed hidden seals on the apartment door when they discontinued surveillance each evening.

Bishopp a warrant to search said apartment. His supporting affidavit (12a-13a) stated as the probable cause for issuance of the warrant the following (13a):

> "And the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: testimony of a Special Agent of the Internal Revenue Service; who: 1) placed horse bets by telephoning number TR 9-2265; 2) that investigation has disclosed that the telephone number is installed at Ground Floor Apartment B at 1582 First Avenue, New York, New York; 3) that a search of the records of the Internal Revenue Service reveal that none of the persons residing at the aforementioned address have paid the Special Tax imposed by Title 26, United States Code, Section 4411; and 4) that wagers were placed by the Special Agent on January 20, 21, 1964."

The affidavit charged (12a) that the gambling paraphernalia so sought was being used as a means of conducting a wagering business in violation of 26 U.S.C. §§ 4401, 4411, 4412 and 7272. The warrant contains the same charge, verbatim (14a).

Thus the only criminal statute referred to was § 7272, which makes it a crime to fail to register (Appendix E, annexed hereto, p. 43). There is no reference in the affidavit or in the warrant to § 7262, the criminal statute which makes it a crime to fail to pay the special occupational tax (Appendix E, p. 43). The statement of probable cause, above quoted, alleges a search of the IRS records which reveals non-payment of the special occupational tax. Nowhere is there a word about search of any records to ascertain whether there was a failure to register.

Carrying this warrant, two of the agents who were conducting the surveillance (Agents Cotter and Reilly) entered the apartment house some time prior to 4 p.m. on January 22, 1964, going through the outer door, the

vestibule door and the hallway to the ground floor rear where Apartment B was situated. Whether they had to use keys on this occasion is not clear in the record although in going in on other occasions during the three days of surveillance, Agent Reilly admittedly (108a-109a) used his own keys to gain an entrance.

Once in the rear hallway these agents, instead of seeking entrance to search Apartment B, which they had now reached, opened the door about four feet away and entered upon the landing at the head of the flight of stairs leading to the cellar. This door was regularly kept locked and even tenants had no access to the stairway or cellar (151a). The agents closed the door, except for a thin crack, and remained concealed behind it on the landing and upper steps.

At about 4 p.m. petitioner Conti came along the hallway and opened the door to Apartment B with a key. As he stood at the open door withdrawing the key, Agent Cotter rushed out of his hiding place and while shouting "Federal Agents with a search warrant" went as fast as he could and without any pause at all through the open door past Conti into the apartment.

Petitioner Newman was in the room sitting at a desk telephoning. Bet slips, odds sheets, U. S. currency and other gambling paraphernalia were seized. Petitioners were subsequently indicted and after a jury trial, were convicted. The fruits of the search were admitted in evidence and were a substantial, perhaps the main, factor in securing the conviction.* A pre-trial Rule 41(e) motion to suppress was unsuccessful (16a-57a). Objections to ad-

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* The papers seized in the search were put in evidence (Exhs. 10-19), were identified by agent Cotter as horse bet slips, etc., and furnished the only computation of the income on which the excise tax was unpaid (Tr. 273). A government expert identified the handwriting on some of these papers as defendant Newman's (Tr. 367-370), on others as defendant Conti's (Tr. 377-379), and on some as the writing of both (Tr. 381-383).

mission in evidence of the seized property were duly made at the trial (e.g., 65a, 81a-82a, 83a, 112a, 113a, 114a, etc.).

The indictment (8a-11a) was in five counts as follows:

1) Willful attempt (§ 7201) to evade paying the 10% excise tax imposed by § 4401.
2) Willful failure (§ 7203) to file the excise tax return required by § 4401.
3) Willful failure (§ 7203) to pay the special tax imposed by § 4401.
4) Willful failure (§ 7203) to pay the special tax imposed by § 4411.
5) Willful failure (§ 7203) to register as required by § 4412.

Petitioner Conti was convicted on all five counts. Petitioner Newman was convicted on the last four; as to him the jury disagreed on the first count.

Reasons for Granting the Writ

1.

With respect to question 1, the same point is now before the Court in *Costello* v. *United States, certiorari* granted March 22, 1966, 383 U. S. 942 (1966), 86 S. Ct. 1195. As the opinion below indicates (Appendix A, p. 28; and see also 114a and Appendix F, p. 49) this constitutional point has been kept open by petitioners for review, with the Second Circuit Court adhering to its decision in *Costello*. All five counts of the indictment (8a-11a) are based on one or another of the wagering tax statutes, 26 U.S.C. §§ 4401, 4411, and 4412. Without burdening the Court with further argument, we respectfully request that the petition be granted permitting question 1 to be reviewed along with the review in *Costello*. The pertinent New York gambling statutes are Penal Law, §§ 973, 986 and 986-c (Appendix E, p. 45).

2.

On question 2, we have pointed out that the search warrent (14a-15a) and affidavit (12a-13a) charged only a viola-

tion of criminal statute § 7272, a failure to register (Appendix E, p. 43). The supporting affidavit on the other hand in stating probable cause for issuance of the warrant alleges only a failure to pay the special occupational tax. Failure to pay is a breach of § 7262 (Appendix E, p. 43). Section 7262 itself, however, is nowhere mentioned in the warrant or the affidavit. There is no attempt in the affidavit to show that there was a failure to register. Thus, the only criminal charge made in the affidavit and the warrant, i.e., breach of § 7272, is not supported in any way by a showing of probable cause. Our contention is that the constitutional requirement of probable cause is not met (Fourth Amendment, Appendix E, p. 40).

The Circuit Court decided (Appendix A, p. 20) that payment of the occupational tax, and registering, are effected at the same time by filing Form 11-C and "the same information which indicated failure to pay the occupational tax in this case also indicated failure to register".* This

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* The statutes themselves (§§ 4411 and 4412) do not require simultaneous registration and payment of the special $50 tax. The Regulations, presumably for convenience of administration, have combined in the single Form 11-C, both the registration statement and the Special $50 tax return (Reg. § 44.4412-1); and require the special $50 tax to be paid with the special $50 tax return (Reg. § 44.6151-1). There is no relationship between the registration statement, as distinguished from the tax return, and the $50 payment. In any event the resulting simultaneity is an attempt by regulation to add to the statutes something which is not there. The attempt is without effect even in federal gambling tax law. *United States* v. *Calamaro*, 354 U. S. 355 at 358-359, 77 S. Ct. 1138 at 1143. So the IRS might be compelled to accept a registration without, or prior to, a tax return. In any event the Regulations have no extra-statutory effect in non-tax law such, for example, as bankruptcy law. *In re Quakertown Shopping Center, Inc.*, 248 F. Supp. 749, at 752 (E. D. Pa. 1965). *A fortiori* they are without effect in the law governing probable cause for search warrant where the requirement is of Constitutional origin. If knowledge of the regulations is to be ascribed to the Commissioner so that he may be presumed to draw the inference, he must also be presumed to know the statutory and decisional law under which the regulation requiring simultaneity is without effect.

is equivalent to holding that the constitutional requirement of probable cause may be satisfied by inference and seems to be contrary to what this Court held in *Sgro* v. *United States* (1932), 287 U. S. 206 at 210, where the stale supporting affidavit was successfully attacked.

In so deciding, the Circuit Court conceded (Appendix A, p. 20) that a prior unreported District Court decision in the Southern District of New York, *United States* v. *Paul Tripodi,* Nov. 14, 1962, Clerk's Index 62 Cr. 655, involving a similar inconsistency, had reached the opposite conclusion and had suppressed the seized property.

We respectfully submit that *Tripodi* is right, in keeping with this Court's decision in *Sgro,* against allowing probable cause to be found by inference only. If a warrant is to issue based solely on a criminal charge of failure to register, the supporting affidavit should show that failure, and not rely on showing a failure to pay, a fact from which the failure to register can be reached, if at all, only by inference.

Assuming that the inference is permissible, clearly the Commissioner never in fact drew any such inference but signed the warrant in a routine way. This is obvious from the long series of unreported decisions in the Southern New York District Court, vacating warrants signed by the same Commissioner.*

* In *Rubicco* v. *Williams,* S.D.N.Y., Civ. 118-279, 9/12/58, Murphy, D. J., the same Commissioner signed a warrant later held void because based on an affidavit that failed to show any search of the records at all, to show either lack of registration or lack of payment. In the very recent *United States* v. *Vicini, et al.,* 65 Cr. 336, Tyler, D. J., S.D.N.Y. February 4th and March 4th, 1966, the same Commissioner signed a warrant later held void because based on an affidavit that wholly omitted any date of observation. In like manner dates were omitted from the supporting affidavits in *U. S.* v. *Paul Tripodi,* S.D.N.Y., 62 Cr. 655, 11/14/62, Metzner, D. J.; *Tripodi* v. *Morgenthau,* 213 F. Supp. 735 (Metzner, D. J., 1962); *Nannariello* v. *Morgenthau,* S.D.N.Y., M-18-65, 4-28-65, Wyatt, D. J.; *Tripodi* v. *Morgenthau,* S.D.N.Y., M-18-65, 5-10-65, Wyatt, D. J. In all of these the warrants issued by the same Commissioner were held void. It seems pure fantasy to think that this Commissioner would or could draw the nice inference that the Second Circuit relies on to validate the search warrant.

3 and 4.

In Questions 3 and 4 petitioners challenge the sufficiency of the supporting affidavit on which the search warrant was issued. The only showing of probable cause in the affidavit was as follows (13a):

> "And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: Testimony of a Special Agent of the Internal Revenue Service: who: 1) placed horse bets by telephoning Tr—9-2265; 2) that investigation has disclosed that this telephone number is installed at Ground Floor Apartment B at 1582 First Avenue, New York, New York; 3) that a search of the records of the Internal Revenue Service reveal that none of the persons residing at the aforementioned address have paid the Special Tax imposed by Title 26 United States Code, Section 4411; and 4); that wagers were placed by the Special Agent on January 20, 21, 1964."

The statement of probable cause is insufficient because (i) no date is given as the date when the horse bets in item 1) were made; (ii) no date is given in item 2) showing when the investigation of the telephone number at Apartment B was made; and (iii) no date is given in item 3) showing when the search of the IRS records was made. The omission of these three vital dates makes the affidavit insufficient under the ruling in *Sgro* v. *United States* (1932), 287 U. S. 206, 53 S. Ct., 138.

The Court below stated that the dates of the horse bets were given as January 20 and 21, 1964, because, said the Court, the wagers in item 4) are the same as the horse bets in item 1).

There is absolutely nothing to indicate that these "wagers" were the "horse bets" first referred to, or even that these "wagers" were horse bets at all or were made by phone. The choice of the different word "wagers" to de-

scribe them would, if anything, indicate that they were not horse bets at all. If they were, there would be no occasion to use another term, the term "wagers," since that term includes policy bets or numbers. The affiant does not even refer to "the" wagers, as he would naturally have done if he had meant to convey the notion that the "wagers" referred to were the "horse bets" previously mentioned.

With respect to the investigation of the telephone number in Apartment B, there is no date given and nothing to indicate that it was current. The ownership, control, occupancy and leasing of the apartment as well as the telephone listing might have changed or been discontinued. We are not told who made the investigation. Obviously, it was not the affiant since he studiously avoids giving himself as the source (see remarks of Mr. Justice Douglas, in *United States* v. *Ventresca* (1965), 380 U. S. 102, 85 S. Ct. 741 at p. 751). Was the unnamed investigator qualified to make the investigation? Who ascertained the location of the telephone and how? From what source? Was inquiry made of the telephone company or not?

There is nothing to indicate when the search of the IRS records was made. No date is given. Here again the search was evidently not made by affiant for he avoids naming himself as the searcher. How then was it made? Was the search made in the proper office? Against what names was it made? Who were the persons residing in the apartment house? Would the searcher know their names? If so, how? How would he know his list of names, if any, was current and correct?

We are thus left with two vital statements, items 2) and 3) of the affidavit, both hearsay and with absolutely no source given by affiant for his information. We are given none of the corroborative information required to make the hearsay credible. *Jones* v. *United States* (1960), 362 U. S. 257, 269, 80 S. Ct. 725, 735.

We also have three fact assertions in items 1) 2) and 3) of the affidavit for which the dates are completely omitted. As was stated in *Sgro, supra,* 287 U. S. at page 210, the Fourth Amendment to the United States Constitution "should be liberally construed in favor of the individual", and the proof of facts must be "so closely related to the time of the issue of the warrant as to justify finding of probable cause at that time." Further, 287 U. S. at page 211, holds that the determination of probable cause "as of that time, cannot be left to mere inference or conjecture."

5.

This Court now holds for the first time that execution of a search warrant commencing with what it calls a "technical" trespass, is permissible. The citations relied upon by the Court (Appendix A, p. 23) are not applicable to the facts at bar. Those decisions deal only with (i) the *lobby* in a multiple dwelling; *U. S.* v. *Miguel,* 340 F. 2d 812 (C. A. 2), cert. den. 382 U. S. 810 (1965), rehearing den. 382 U. S. 912 (1965); and (ii) the hallways in a multiple dwelling leading *directly* to the apartment in question; *U. S.* v. *Buchner,* 164 F. Supp. 836 (D.C.D.C.), aff'd per curiam 268 F. 2d 891 (D. C. Cir. 1958), cert. den. 359 U. S. 908 (1959), and *U. S.* v. *St. Clair,* 240 F. Supp. 338 (S.D.N.Y. 1965).

The result in those decisions might be justified by necessity since otherwise the apartments in multiple dwellings could be turned into a modern form of medieval sanctuary against arrest or search. But here the agents went far beyond the necessities of the search warrant. At the most, the warrant permitted them to go through the outside doors into the hallway and through the hallway directly to Apartment B in order to search it. They departed from that course. They opened the doorway to a flight of stairs leading down to the cellar. This doorway was kept locked, and was not accessible even to tenants (151a, 152a). The agents went in upon the stairway landing and hid behind the door. This was plain trespass

and not "technical" at all. No case cited in the decision, and no case that we are aware of, has attempted to justify such an action.

The Second Circuit Court now declares such trespasses permissible. This may be the opening of Pandora's box. At least the Court should have stated the complete facts in accordance with our request in the petition for rehearing (Appendix C, pp. 32-33). As the decision now reads, these facts of record are not made clear and the reader of the decision is left to suppose that only the "semi-public" lobby and hallway to the subject apartment are involved.

What the Court below has decided on this point is, in any event, at variance with what this Court, by Mr. Justice Jackson, said in *McDonald* v. *U. S.*, 335 U. S. 451, 458-59 (1948).

Moreover, similar illegal encroachment, in a different context of course, was condemned by this Court in the recent *Miranda* v. *State of Arizona* (6/13/66), 34 LW 4521, at 4528:

> "Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that 'illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.' Boyd v. United States, 116 U. S. 616, 635 (1886)."

and at page 4534:

> "Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." Olmstead v. United States, 277 U. S. 438, 485 (1928) (dissenting opinion).

6.

With respect to question 6, 18 U.S.C. § 3109 (Appendix E, p. 40) provides that an agent may execute a search warrant by breaking in "if, after notice of his authority and purpose, he is refused admittance."

The Second Circuit now holds (Appendix A, p. 24) that "breaking" as used in § 3109 means only a "forcible" entry, citing its own two prior decisions: *United States* v. *Monticallos,* 349 F. 2d 80 (C. A. 2, 1965) and *United States* v. *Garnes,* 258 F. 2d 530 (C. A. 2, 1958), cert. den. 359 U. S. 937 (1958). Neither of these last two cases stands for such a proposition. *United States* v. *Monticallos,* involved a non-warrant narcotics arrest on probable cause, with incidental search and simply held (p. 82) that the question of unlawful entry was not raised below and could not be considered. *United States* v. *Garnes* also involved a non-warrant narcotics arrest on probable cause, with incidental search and the question of entry was not considered or even mentioned.

The present decision is therefore the first decision on this point in the Second Circuit. Since the door to Apartment B was open, the Court holds that there could be no "breaking" and therefore no necessity for the agent to wait a reasonable time for either permission to enter or refusal of entry.*

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* The opinion below states that Agent Cotter "walked" into the apartment (Appendix A, p. 23). Actually, simultaneously with announcing his identity and purpose and without any pause whatsoever, Cotter *rushed* past Conti as fast as he was able, through the open door (Testimony of Reilly 105a-106a; testimony of Cotter 122a). We attempted, without avail, in our petition for rehearing (Appendix C, p. 31) to have the Court below correct this factual error. The method of entry was not "entirely peaceable" as the Court labelled it (Appendix A, p. 24). Rather, it resembles the method of entry held illegal in *Hair* v. *United States,* 289 F. 2d 894, 897 (D. C. Circuit, 1961).

This decision is in direct conflict with two District of Columbia Circuit Court decisions and one 9th Circuit Court decision which hold that any non-permissive entry is "forcible".

Keiningham v. *United States,* 287 F. 2d 126 (D.C. Cir. 1960), at page 130:

> "We think that a person's right to privacy in his home (and the limitation of authority to a searching police officer) is governed by something more than the fortuitous circumstances of an unlocked door, and that the word 'break' as used in 18 U.S.C. § 3109, means 'enter without permission.' We think that a 'peaceful' entry which does not violate the provisions of § 3109 must be a permissive one and not merely one which does not result in a breaking of parts of the house."

Hair v. *United States,* 289 F. 2d 894 (D.C. Cir., 1961), at page 897:

> "The record in this case does not disclose whether the door to Hair's home was locked, closed but unlocked or merely left ajar. But even if we were to assume that the door was left open, only the sheerest sophistry would describe as 'peaceable' the charge of three police officers with drawn weapons across the threshold of a home."

Munoz v. *United States,* 325 F. 2d 23 (9th Cir. 1963), at page 26:

> "While it is true that the officers did not break open the door to appellant's room, we believe that the entry into his room by a passkey obtained from the clerk of the hotel amounts to the same thing. It is clear from the quoted testimony of Agent Fahey that the knock on the door and the announcement by Agent Lang, and

> the entry, were practically instantaneous. Entry to the appellants' room in the manner described completely ignores and destroys the reasons for and the purposes behind the provisions of the above quoted section [§ 3109]."

The resolution of this conflict between the decisions of the District of Columbia and 9th Circuits, and the Second Circuit, is of immense importance, for it is clear that if the word "forcibly" as used in § 3109 covers the non-permissive entry made here, the warrant was illegally executed.

In *Wong Sun* v. *United States* (1963), 371 U. S. 471, at 482, 83 S. Ct. 407, at 414, this Court held:

> "We noted in that case (Miller v. U. S., 357 U. S. 301, 78 S. Ct. 1190, 2 L. Ed. 2d 1332), that the lawfulness of an officer's entry to arrest without a warrant 'must be tested by criteria identical with those embodied in 18 U.S.C. Sec. 3109, which deals with entry to execute a search warrant.' 357 U. S., at 306 (78 S. Ct. 1194). That statute requires that an officer must state his authority and his purpose at the threshold, and be refused admittance, before he may break open the door."

To the same effect: *Miller* v. *United States*, 357 U. S. 301 at p. 313, 78 S. Ct. 1190, 1197.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM T. GRIFFIN,
Counsel for Petitioners.

Appendix A.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 289—September Term, 1965.

(Argued March 24, 1966 Decided June 1, 1966.)

Docket No. 30114

UNITED STATES OF AMERICA,

Appellee,

—v.—

RALPH CONTI and DAVID NEWMAN,

Appellants.

Before:

WATERMAN, MOORE and FEINBERG,

Circuit Judges.

Appeals from judgments of conviction for willful failure to comply with federal wagering tax statutes, in violation of 26 U. S. C. §§7201 and 7203, entered on jury verdicts of guilty after trial in the District Court for the Southern District of New York, John M. Cannella, *Judge*. Affirmed.

WILLIAM T. GRIFFIN, New York, N. Y. (James F. Hart and Dorsey, Burke & Griffin, New York, N. Y., with him on the brief), *for the appellant Conti.*

Appendix A.

IRWIN KLEIN, New York, N. Y., *for the appellant Newman.*

MICHAEL W. MITCHELL, Assistant United States Attorney (John E. Sprizzo, Assistant United States Attorney, and Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., with him on the brief), *for the appellee.*

MOORE, *Circuit Judge*:

Appellant Ralph Conti was convicted of willfully evading payment of the federal excise tax on wagering imposed by 26 U. S. C. §4401, in violation of 26 U. S. C. §7201; willfully failing to file a wagering excise tax return, in violation of 26 U. S. C. §§7203, 4401, 6071, and 6061; willfully failing to pay the excise tax on wagers, in violation of 26 U. S. C. §§7203 and 4401; and engaging in the business of accepting wagers without paying the tax imposed by 26 U. S. C. §4411 and without registering with the District Director of Internal Revenue as required by 26 U. S. C. §4412, all in violation of 26 U. S. C. §7203. Appellant David Newman was charged with the same offenses and convicted of all but the first, as to which charge the jury disagreed.

I. *The Legality of the Search of the Apartment.*

After Special Agent Nicholas Treretola of the Internal Revenue Service placed a bet in a call to a telephone located in Apartment B, 1582 First Avenue, New York, New York, the Internal Revenue Service placed the apartment under surveillance for a few days, observed Newman and Conti coming in and out of the apartment, and placed more

bets over the phone. On January 22, 1964, a United States Commissioner issued a warrant for the search of the apartment, upon the affidavit of Special Agent David Ostrager. The warrant was executed the same day while Conti and Newman were in the apartment. Both men were arrested and a variety of bet slips, odds sheets, racing programs, and the like were seized.

Appellants moved to suppress the fruits of this seizure before trial. Judge Weinfeld denied the motions in an opinion reported at 232 F. Supp. 1004 (S. D. N. Y. 1964). The fruits of the search were admitted into evidence at trial over the objections of the appellants. Appellants now urge that the fruits of the search were inadmissible for any of several reasons, and that as a result the convictions must be reversed.

Appellants urge first that the warrant was fatally inconsistent with the affidavit upon which it was based. The warrant declared that there was probable cause to believe that betting slips and various other gambling paraphernalia were being concealed at the apartment and were being used in the business of accepting wagers in violation of 26 U. S. C. §§4401, 4411, 4412, and 7272. The first of these sections imposes a federal excise tax on wagering; the second imposes a $50 annual tax on persons accepting wagers; the third requires such persons to register with the district director of internal revenue; and the fourth imposes a $50 penalty on such persons who fail to register. Appellants urge that the only criminal offense mentioned in the warrant is that of not registering, whereas the affidavit of the Special Agent sets forth reasons for believing that the apartment was being used to carry on the business of accepting wagers without payment of the special occupational tax, but does not mention any grounds for believ-

ing that the residents had not registered with the District Director. An unreported case, *United States* v. *Tripodi*, S. D. N. Y., November 14, 1962, 62 Cr. 655, held that just such an inconsistency between an arrest warrant and the complaint on which it was issued presented grounds for the suppression of evidence obtained as a result of the subsequent arrest.

We do not find this apparent inconsistency fatal. The facts set forth in the affidavit indicated reasonable grounds for the belief that appellants had not paid their occupational tax. Payment of the occupational tax accompanies filing of a return on Form 11-C, which is the means prescribed by the Regulations for registering in order to comply with §4412 and to avoid violation of §7272. Regs. §44.4901-1(a), (c). The same information which indicated failure to pay the occupational tax in this case also indicated failure to register, and therefore violation of §7272.

Appellants also challenge the sufficiency of the affidavit upon which the search warrant was issued. The affidavit, given by a special agent of the IRS, set forth the following as indicative of probable cause:

> ". . . Testimony of a Special Agent of the Internal Revenue Service who: (1) placed horse bets by telephoning number TR 9-2265; (2) that investigation has disclosed that the telephone number is installed at Ground Floor Apartment B at 1582 First Avenue, New York, New York; (3) that a search of the records of the Internal Revenue Service reveal that none of the persons residing at the afore-mentioned address have paid the Special Tax imposed by Title 26, United States Code, Section 4411; and (4) that wagers were placed by the Special Agent on January 20, 21, 1964."

The date of the affidavit was January 22, 1964.

Appellants point out that the information relied on is not that of the affiant. However, hearsay may serve as the basis for the issuance of a warrant, if there is reason to believe that the hearsay is reliable. *Rugendorf* v. *United States*, 376 U. S. 528, 533 (1964); *Jones* v. *United States*, 362 U. S. 257 (1960). Here, the declarant was a special agent, and he spoke of things he himself had done in telephone calls to the phone located in the apartment. This seems sufficient indication of the reliability of the information. See *United States* v. *Freeman*, —— F. 2d —— (2d Cir. 1966).

Appellants contend that the affidavit does not indicate various crucial dates and, therefore, does not indicate that probable cause existed on a date close to the date of issuance of the warrant. *Sgro* v. *United States*, 287 U. S. 206 (1932). However, it seems fairly clear from the language of the affidavit that the special agent on whose information the affiant relies placed the bets on January 20 and 21. The use of the article "the" to refer to the special agent described under (4) indicates that the agent intended is the same as the one mentioned at the beginning of the paragraph. Moreover, the use of the present tense in the phrase "a search of the records . . . reveal" [sic] indicates that the search was made at a time close to the time of the giving of the affidavit.

It is true that details of who made the search and the investigation mentioned in (2) and (3) are not given. It is also true that the paragraph is not a paragon of grammar and style. But we must bear in mind the recent comments of the Supreme Court that:

> ". . . affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a com-

> monsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

United States v. *Ventresca,* 380 U. S. 102, 108 (1965). Under the standards of *Ventresca,* the affidavit here was sufficient grounds for issuance of the warrant.

Appellants maintain, however, that even if the allegations constituted probable cause, the evidence underlying those allegations was procured by trespass. It appears that the apartment building had a hall door which was meant to be kept locked and which could be opened only by tenant's keys or buzzes from tenants. There was testimony to the effect that the door was often open, and even if closed, its lock was broken and could be opened by almost any key. Appellants argue that evidence constituting probable cause was obtained only by keeping Apartment B under surveillance from inside the hall door, and that IRS agents entered this protected and semi-private space without the consent of the tenants and, consequently, as trespassers. See *McDonald* v. *United States,* 335 U. S. 451, 458-59 (1948) (Jackson, *J.*, concurring). However, the Supreme Court in *McDonald* did not hold that officials could not peaceably enter common corridors and hallways in a multiple dwelling in the course of a surveillance. In that case, the police gained entrance to the building by climbing in through the landlady's window, and intruded upon the defendant's right

of privacy before arresting him by peering through his transom. More recent cases have indicated that peaceable entry which works a technical trespass is permissible in order to gather evidence indicating probable cause, so long as the trespass does not impinge upon some area protected by the Fourth Amendment. *United States* v. *Buchner,* 164 F. Supp. 836 (D. D. C.), *aff'd per curiam,* 268 F. 2d 891 (D. C. Cir. 1958), *cert. denied,* 359 U. S. 908 (1959); see *United States* v. *St. Clair,* 240 F. Supp. 338 (S. D. N. Y. 1965). This court has recently held that a lobby of an apartment house, guarded by a door usually kept locked, is not within the curtilage of a tenant's apartment, and so is not a protected area within which the individual tenants have Fourth Amendment rights. *United States* v. *Miguel,* 340 F. 2d 812 (2d Cir.), *cert. denied,* 382 U. S. 859 (1965). It follows from *Buchner* and *Miguel* that the peaceable entry here involved, although perhaps a technical trespass, did not vitiate the surveillance evidence tending to establish probable cause.

Finally, appellants urge that the method of execution of the warrant was illegal. On January 22, armed with the warrant, two IRS agents entered the hallway of the apartment building and watched the door of Apartment B from behind the door leading to the cellar. When they saw Conti unlock the door to the apartment, both agents came out. One announced that he was a federal officer with a search warrant and walked past Conti into the apartment while Conti was withdrawing the key from the lock.

Appellants maintain that this conduct was in violation of 18 U. S. C. §3109, which provides that:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after

notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

Appellants contend that "breaking" under this statute must be read broadly to mean any entry without permission, even though the entry does not damage any part of the house, see *Keiningham* v. *United States,* 287 F. 2d 126 (D. C. Cir. 1960).

However, it is clearly established in this circuit that "breaking" in the statute means forcible entry. *United States* v. *Garnes,* 258 F. 2d 530, 533 (2d Cir.), *cert. denied,* 359 U. S. 937 (1958); *United States* v. *Monticallos,* 349 F. 2d 80 (2d Cir. 1965) (agents entered unannounced, following prospective customer for narcotics through open door). The entry here was entirely peaceable.

II. *The Language in the Indictment Charging Both Receiving and Accepting Wagers.*

All five counts against each of the defendants charged them with having been "engaged in the business of accepting wagers and in receiving wagers for and on behalf of a person engaged in the business of accepting wagers. . . ." Appellants urge, as they did below, that the Government should have been required to elect between charging appellants as receivers or as acceptors of wagers.

The statutes differentiate between an "acceptor" of wagers, who is the banker or principal in a wagering operation, and "receivers" of wagers, who take bets as runners or agents for "acceptors," H. R. Rep. No. 586, 82nd Cong. 1st Sess. 56 (1951); Sen. Rep. No. 781, 82nd Cong. 1st Sess. 114 (1951) and courts have held fatal a variance between an indictment charging one form of betting activity, and proof

establishing another. *United States* v. *Pepe,* 198 F. Supp. 226 (D. Del. 1961), *aff'd per curiam,* 339 F. 2d 264 (3d Cir. 1964). However, the same court which affirmed *Pepe* later held that it was not grounds for reversal to charge both "accepting" and "receiving" where the evidence indicated the presence of both activities and where no request for an election had been made at trial. *United States* v. *Manos,* 340 F. 2d 534 (3d Cir. 1965). But cf. *United States* v. *Nicholas,* 224 F. Supp. 310 (W. D. Pa. 1963).

We hold that the indictment was not defective for charging both activities in the conjunctive, even though the defendants requested an election at trial. Charging alternative ways of violating a statute in the conjunctive is permissible, and a conviction under such an indictment will be sustained if the evidence indicates that the statute was violated in any of the ways charged. *Smith* v. *United States,* 234 F. 2d 385 (5th Cir. 1956). This principle applies here. Both the acceptor and the receiver are required to register under §4412 and to pay the occupational tax imposed by §4411. The acceptor is required to pay the excise tax under §4401, and the Regulations make clear that a receiver also is liable under §4401, until he discloses the name of his principal. Reg. §44.4401-2(a)(2). In short, accepting and receiving without registering and paying the taxes imposed by these sections amount, in effect, to different ways of violating the same statutes.

III. *Miscellaneous Conduct and Rulings of the Trial Court.*

Appellants assert they were denied a fair trial as a result of the conduct and rulings of the trial court. They cite several instances, which may be summarized and disposed of briefly.

Appendix A.

The trial court required appellants to choose between making their opening statements immediately after the opening statements of the prosecution, and not making them at all. This seems well within the trial court's broad power to regulate the conduct and timing of a trial, and not prejudicial to the defendants.

The trial court excluded offered testimony of a retired special agent of the IRS, by whose testimony appellants intended to show that the special agents watching from behind the cellar door could not have seen activities at the door of Apartment B. This evidence was of little relevance except as to the existence of probable cause, which had already been established in the preliminary hearing before Judge Weinfeld. Moreover, the testimony would tell the jury nothing it could not deduce by itself from the testimony as to the lay-out of the apartment and the landing.

The trial court declined to hold a new hearing on the admissibility of the fruits of the search, saying that he was content to abide by the results of the hearing before Judge Weinfeld. This was perfectly proper, in the absence of any offer of important new evidence of which appellants were not aware at the time of the preliminary hearing. *United States* v. *Wheeler*, 172 F. Supp. 278 (W. D. Pa. 1959), *aff'd*, 275 F. 2d 94 (3d Cir. 1960); *Waldron* v. *United States*, 219 F. 2d 37 (D. C. Cir. 1954).

The trial court urged throughout that the trial time be held to one week. Appellants do not indicate how they were prejudiced by this insistence. They contend that the court misled them into thinking that requests for charges would be considered timely up to the time of charge. This is simply not so. Nor is it true that the trial court denied them sufficient time to have their handwriting expert examine the exhibits which the Government claimed were in the hand-

writing of the appellants. The appellants had known that this material was in the possession of the Government for months, and knew as of the first day of trial that the Government intended to establish by means of a handwriting expert that the material was written by the appellants.

After the jury had been out for some time, the court called them in to question them as to whether it would be necessary to reserve hotel rooms for them. He called up counsel for a side-bar conference and told them that he intended to ask the jury, not as to how they were thinking, but as to which counts they were in agreement on, one way or the other. Counsel acquiesced, counsel for the appellants apparently in the belief that the trial court would accept the verdict on the last four counts and might dismiss the first count. The jury reported agreement on all counts except as to Count 1 against one defendant. The trial court accepted this as the verdict of the jury. We fail to see how appellants were prejudiced by this procedure.

Finally, in the charge to the jury, the court spoke in passing of the need to demonstrate a greater quantum of willfulness with respect to a felony count than with respect to a misdemeanor count. The language was not dissimilar to that used by the Supreme Court in discussing the same point in *Ingram* v. *United States*, 360 U. S. 672, 676 (1959). Moreover, the charge read as a whole is a fair statement of the different requirements of proof under the different counts.

IV. *Sufficiency of the Evidence on Count 1.*

Conti, the sole appellant convicted under Count 1, urges that the evidence against him was insufficient, since it did not establish willfulness. It is true that there was no evidence which directly indicated that for several months Conti

knew of the existence of the 10% excise tax imposed by §4401 and nevertheless deliberately attempted to evade it. However, Conti's conduct before arrest and his extraordinary behavior at the time of arrest was sufficient to establish the willfulness of his conduct. Conti used a code to conceal the name of bettors. He approached and departed the apartment in a surreptitious fashion. At the time of his arrest, he gave a false name and, when told that he was being arrested for not having the federal tax stamp, he replied that he had not been caught taking bets. He also attempted to discard the keys to the apartment and various odds sheets without attracting the attention of the arresting officers.

V. *The Constitutionality of the Wagering Tax Statutes.*

Appellants make a *pro forma* attack on the constitutionality of the wagering tax statutes "in order . . . to preserve [the argument] for possible review. . . ." We adhere to our recent decision in *United States* v. *Costello*, 352 F. 2d 848 (2d Cir. 1965), *cert. granted*, 34 U. S. L. Week 3317 (Mar. 22, 1966), upholding the constitutionality of these statutes.

VI. *Conclusion.*

The convictions are affirmed.

Waterman, Circuit Judge: I concur in the result.

Appendix B.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of June, one thousand nine hundred and sixty-six.

Present: HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RALPH CONTI and DAVID NEWMAN,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

Appendix C.

Petition for Rehearing.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

DOCKET NO. 30114

UNITED STATES OF AMERICA,

Appellee,

against

RALPH CONTI and DAVID NEWMAN,

Defendants-Appellants.

PETITION FOR REHEARING BY THE COURT AS CONSTITUTED IN THE ORIGINAL HEARING OR EN BANC, OR IN THE ALTERNATIVE FOR A STAY OF THE MANDATE AND CONTINUANCE OF BAIL PENDING APPLICATION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, Waterman, Moore and Feinberg, Circuit Judges:

The decision affirming the judgment of conviction was rendered June 1, 1966.

Appellants respectfully petition this Honorable Court for a re-hearing of the appeal by the Court as constituted in the original hearing or *en banc,* to submit once again the argued position on the points of the appeal, and particularly to call the Court's attention to the following three items in the first two of which the operative facts

appear to be either incorrectly stated in or omitted from the decision, as the third of which was not referred to in the decision.

(1)

In that part of its decision upholding the legality of the execution of the search warrant (at p. 2155), this Court states:

> "When they saw Conti unlock the door to the apartment, both agents came out. One announced that he was a federal officer with a search warrant and *walked* past Conti into the Apartment while Conti was withdrawing the key from the lock." (Italics added.)

The Government claimed that agent Cotter walked (Gov. brief, p. 13); but, as we pointed out on page 7 of appellants' reply brief, the record is quite clear that agent Cotter did not walk but *rushed as fast as he could* through the open door. See agent Reilly's testimony at pages 105a-106a, and agent Cotter's testimony at page 122a, of defendants-appellants' appendix.

This method of entry by rushing at top speed is not "entirely peaceable" as this Court has labeled it at page 2156 of the decision. This method of entry resembles that which was held illegal in *Hair* v. *U. S.*, 289 F. 2d 894, 897 (D. C. Cir. 1961). We feel that this circumstance ought to persuade the Court to change its ruling on the execution of the search warrant. In any event we submit that the decision should be revised to state the fact precisely.

There is a conflict between the instant decision and the decisions of the District of Columbia Circuit in *Keningham* v. *U. S.*, 287 F. 2d 126, 130 (D. C. Cir. 1960) and *Hair* v. *U. S., supra.* The instant decision departs even from what this Court itself suggested in *U. S.* v. *Price*, 345 F. 2d 256, 259, footnote 6 (C. A. 2, 1963).

Appendix C.

The two prior cases in this circuit cited and relied on in the decision (p. 2156), *United States* v. *Garnes,* 258 F. 2d 530, 533 (C. A. 2, 1958), Cert. Den. 359 F. 2d 937 (1958), and *United States* v. *Monticallos,* 349 F. 2d 80 (C. A. 2, 1965) are not apposite. In *U. S.* v. *Garnes,* a case of a non-warrant, narcotics arrest on probable cause, with incidental search, the question of entry was not considered or even mentioned. *U. S.* v. *Monticallos,* a case of a non-warrant, narcotics arrest on probable cause, with incidental search, simply held (at p. 82) that the question of unlawful entry was not raised below and could not be considered.

Since in the event rehearing is denied, the Supreme Court will be asked to resolve the conflict, we submit that the fact of the manner of entry ought to be clearly stated.

(2)

This Court now holds for the first time that execution of a search warrant commencing with an admitted, albeit, "technical", trepass is permissible. However, the citations relied upon are not applicable to the facts at bar. Those decisions deal only with (i) the *lobby* in a multiple dwelling; *U. S.* v. *Miguel,* 340 F. 2d 812 (C. A. 2), cert. den. 382 U. S. 859 (1965); and (ii) the hallways in a multiple dwelling leading *directly* to the apartment in question; *U. S.* v. *Buchner,* 164 F. Supp. 836 (D.D.C.), aff'd per curiam 268 F. 2d 891 (D. C. Cir. 1958), cert. den. 359 U. S. 908 (1959), and *U. S.* v. *St. Clair,* 240 F. Supp. 338 (S.D.N.Y. 1965).

The result in such decisions might be justified by necessity since otherwise the apartments in multiple dwellings could be turned into a modern form of medieval sanctuary against arrest or search. However, we submit it would be far better to hold forthrightly that, of necessity, there can be no trespass upon a lobby or a hall which is open to

multiple tenants, their invitees, their landlord's maintenance men, etc., than to validate a search on the basis of an illegal act even if it is called a "technical" trespass. But, in any event, here the agents went far beyond the necessities of the search warrant. At the most, the warrant permitted them to go through the outside doors into the hallway and through the hallway directly to Apartment B in order to search it. They departed from that course. They opened the doorway to a flight of stairs leading down to the cellar. This doorway was kept locked, and was not accessible even to tenants (151a, 152a). The agents went in upon the stairway landing and hid behind the door. This was clear trespass, and not "technical" at all. No case cited in the decision, and no case that we are aware of, has attempted to justify such an action.

This Court now declare such trespasses permissible. This may be the opening of Pandora's box. We submit the Court should reconsider its decision. In the event it adheres to its present decision, we feel the Court should state the complete facts. As the decision now reads, these facts of record are not made clear and the reader of the decision is left to suppose that only the "semi-public" lobby and hallway to the subject apartment are involved.

What the Court has decided on this point is at variance with what the Supreme Court, by Mr. Justice Jackson, said in *McDonald* v. *U. S.*, 335 U. S. 451, 458-59 (1948). In the event this motion is denied, the Supreme Court will be asked to define the applicable law.

(3)

The decision completely omits any consideration of our argument that the execution of the search warrant was illegal because 18 U.S.C. § 3109 was not complied with. Admittedly, agent Cotter did not wait a reasonable time,

or any time at all, between announcing his presence and purpose, and entering. He rushed in as fast as he could (105a, 106a, 122a). See *U. S.* v. *West* 328 F. 2d 16, 18 (C. A. 2, 1964); *Masiello* v. *U. S.*, 317 F. 2d 121 (Cir. D. C. 1963).

The open door gave no authority to the agents to disregard the Congressional mandate of § 3109. *U. S.* v. *Price,* 345 F. 2d 256, 259, footnote 6 (C. A. 2, 1963).

As to Staying the Mandate and Continuing Bail Pending Application for Certiorari to the Supreme Court

In the event this Court should deny rehearing, appellants intend to present to the United States Supreme Court a petition for a writ of certiorari to review the determination of this Court. It is respectfully prayed that the mandate of this Court be stayed until the determination of said petition so to be filed, and that pending such determination the appellants be continued on bail.

Five Questions to Be Presented in a Petition for Certiorari

The three issues above discussed as well as the other points of the original brief are, it is submitted, of sufficient substantiality to require a review by the United States Supreme Court.

In addition to the three points heretofore discussed, the Court is aware (decision, p. 2160) that, among others, precisely the same issue is involved in this case as had been granted certiorari by the Supreme Court in *United States* v. *Costello,* 352 F. 2d 848 (C. A. 2, 1965) cert. granted 34 United States Law Week 3317 (March 22, 1966). We have inquired of counsel in the *Costello* case respecting its present status and have been advised that the appellants'

briefs will be filed some time during the summer. Accordingly, that case will not be heard by the Supreme Court until some time after the opening of the October 1966 term of the Court.

It seems reasonable to think that the Supreme Court on a petition for certiorari in the instant case will grant the petition at least so far as concerns the constitutionality of the Federal Wagering Statutes, and will decide the appeal thereon along with that in *Costello*.

Further, we shall ask the Supreme Court to grant certiorari on the question whether the decision herein or that in *U. S.* v. *Tripodi*, S.D.N.Y. 11/14/62, unreported, correctly states the law, where the warrant and the complaint are inconsistent. This Court now holds that the failure to register may be inferred from information showing failure to pay the tax. *Tripodi* holds that it may not, and *Sgro* v. *U. S.*, 287 U. S. 206, 210, 53 S. Ct. 138, 140 (1932), appears to sustain *Tripodi* and preclude making the determination by *inference* from the failure to pay the tax that there has been a failure to register.

Finally, the Supreme Court will be asked to pass on the sufficiency of the affidavit for warrant where admittedly the sources of items 2 and 3 in the affidavit are not given and it is clear that they are hearsay. *U. S.* v. *Ventresca*, 380 U. S. 102 (1965), the only authority cited on this point in the decision, does not justify the finding of sufficiency.

The five questions above referred to are, we submit, important enough to be reheard by this Court *en banc*.

Defendant Conti was sentenced to five concurrent one-year terms, and fines aggregating $9,000.

Defendant Newman, who was found guilty on only the last four (misdemeanor) counts of the indictment, was

sentenced to four concurrent three-month terms and fines aggregating $1,000.

The defendant Conti is at liberty on bail of $10,000, and defendant Newman is at liberty on bail at $3,500.

Both defendants have always been available whenever their presence was required.

Defendant Conti is a married man, father of three children and a grandfather, living with his wife in their own home at Nine Mulberry Road, Briarcliff, New York. Defendant Newman is father of a married daughter and resides at 61-15 98th Street, Rego Park, Queens, N.Y.C.

In view of the foregoing facts we respectfully submit that the mandate be stayed and bail be continued pending determination of the certiorari proceedings.

No prior application for the relief prayed for herein has been made.

For the reasons set forth this petition for rehearing or in the alternative, for a stay of the mandate and a continuance of bail, should be granted.

Respectfully submitted,

Dorsey, Burke & Griffin,
Attorneys for Appellant Conti,
44 Wall Street,
New York, New York 10005.

Irwin Klein,
Attorney for Appellant Newman,
2 Park Avenue,
New York, New York.

Appendix C.

CERTIFICATE.

I, WILLIAM T. GRIFFIN, certify that I am a member of the firm of DORSEY, BURKE & GRIFFIN, attorneys for the appellant Conti in this cause; that I am of counsel for both appellants; that I make this certificate in compliance with the rules of this Court; that in my judgment the within and foregoing petition is well founded and is not frivolous or interposed for delay.

WILLIAM T. GRIFFIN.

Dated: June 13, 1966.

Appendix D.

Orders Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA,

Appellee,

v.

RALPH CONTI and DAVID NEWMAN,

Appellants.

PETITION FOR REHEARING IN BANC.

DORSEY, BURKE & GRIFFIN, New York, N. Y., for appellant Ralph Conti.

IRWIN KLEIN, New York, N. Y., for appellant David Newman.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

28 June 1966

Appendix D.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA,

Appellee,

v.

RALPH CONTI and DAVID NEWMAN,

Appellants.

Petition for rehearing by the court as constituted in the original hearing or en banc, or in the alternative for a stay of the mandate and continuance of bail pending application for a writ of certiorari.

DORSEY, BURKE & GRIFFIN, New York, N. Y., for Appellant Ralph Conti.

IRWIN KLEIN, New York, N. Y., for Appellant David Newman.

Petition for rehearing denied.

Mandate is stayed and appellants admission to bail continues, all pending application to U. S. Supreme Court for a writ of certiorari which stay and continuance of bail is condtioned upon strict compliance with the 30 day time limt contained in Rule 28(c) of this Court.

S. R. W.,
L. P. M.,

W. F.,
U. S. C. JJ.

June 28, 1966.

Appendix E.

Constitution of the United States.

CONSTITUTION OF THE UNITED STATES
AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. . . .

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

In pertinent part:

"• • • nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

Statutes and Regulations Involved.

Title 18, United States Code

§ 3109. *Breaking doors or windows for entry or exit.*

The officer may break open any outer or inner window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Appendix E

Title 26, United States Code

§ 4401. *Imposition of tax*

(a) *Wagers.*—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) *Amount of wager.*—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) *Persons liable for tax.*—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

§ 4411. *Imposition of tax*

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

§ 4412. *Registration*

(a) *Requirement.*—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) *Firm or company.*—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) *Supplemental information.*—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

§ 7201. *Attempt to evade or defeat tax*

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

§ 7203. *Willful failure to file return, supply information, or pay tax*

Any person required under this title to pay any estimated tax or tax, or required by this title or by

regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

§ 7262. *Violation of occupational tax laws relating to wagering—Failure to pay special tax*

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

§ 7272. *Penalty for failure to register*

(a) *In general.*—Any person who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50.

FEDERAL TAX REGULATIONS

§ 44.4901-1 *Payment of special tax*

(a) *Condition precedent to carrying on business.* No person shall engage in the business of accepting wagers subject to the tax imposed by section 4401 until he has filed a return on Form 11-C and paid the special tax imposed by section 4411. Likewise, no person shall engage in receiving wagers for or on behalf of

any person engaged in the business of accepting wagers until he has filed a return on Form 11-C and paid the special tax imposed by section 4411. For provisions relating to the tax imposed by section 4411, see Subparts B and C of this part, respectively.

• • •

(c) *Tax payment evidenced by special tax stamp.* (1) Upon receipt of a return on Form 11-C, together with remittance of the full amount of tax due, the district director will issue a special tax stamp as evidence of payment of the special tax.

§ 44.4412-1 *Registration*

(a) *In general.* Every person required to pay the special tax imposed by section 4411 shall register and file a return on Form 11-C. For provisions relating to the general requirement for filing a return, see § 44.6011(a)-1.

§ 44.6071-1 *Time for filing return*

(a) *Return on Form 730.* Each return required to be made on Form 730 pursuant to § 44.6011(a)-1 shall be filed on or before the last day of the first calendar month following the period for which it is made. . . .

(b) *Return on Form 11-C.* (1) The first return required to be made on Form 11-C shall be filed to cover the period beginning with the first day of the calendar month in which a person engages (or expects to engage) in activities which make him liable for the special tax imposed by section 4411 and ending with the following June 30. Thereafter, each return required to be made on Form 11-C shall be filed on or before July 1 to cover a 1-year period (beginning July 1 and ending June 30 of the following calendar year) during which taxable activity continues.

§ 44.6091-1 *Place for filing returns*

(a) *In general.* A return on Form 730 or Form 11-C shall be filed with the district director of internal revenue for the district in which is located the legal residence or principal place of business of the person making the return. . . .

§ 44.6151-1 *Time and place for paying taxes*

The taxes imposed by sections 4401 and 4411 shall, without assessment or notice and demand, be paid to the internal revenue officer with whom the returns are required to be filed at the time fixed for filing the returns. . . .

Federal Rules of Criminal Procedure.

Rule 41 (e) Motions for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the District Court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that . . . (2) the warrant is insufficient on its face . . . or (5) the warrant was illegally executed.

New York Penal Law.

§ 973. *Keeping gaming and betting establishments.*

Any corporation or association or the officers thereof or any co-partnership or individual, who keeps a room, shed, tent, tenement, booth, building, float or vessel, or any other enclosure or place, or any part thereof, used for gambling, or for any purpose or in any man-

ner forbidden by this article, or for making any wagers or bets made to depend upon any lot, chance, casualty, unknown or contingent event or on the future price of stocks, bonds, securities, commodities or property of any description whatever or for making any contract for or on account of any money, property or thing in action, so bet or wagered, or being the owner or agent, knowingly lets or permits the same to be so used, is guilty of a misdemeanor. This section shall not be extended so as to prohibit or in any manner affect any insurance made in good faith for the security or indemnity of the party insured and which is not otherwise prohibited by law, nor to any contract on bottomry or respondentia. As amended L. 1910, c. 487, eff. Sept. 1, 1910.

§ 986. *Pool-selling, book-making, bets and wagers, et cetera.*

Any person who engages in pool-selling, or book-making with or without writing at any time or place; or any person who keeps or occupies any room, shed, tenement, tent, booth or building, float or vessel, or any part thereof, or who occupies any place, or stand of any kind, upon any public or private grounds within this state with books, papers, apparatus or paraphernalia, for the purpose of recording or registering bets or wagers, or of selling pools, and any person who records or registers bets or wagers or sells pools or makes book, with or without writing, upon the result of any trial or contest of skill, speed or power of endurance of man or beast, or upon the result of any political nomination, appointment or election; or upon the result of any lot, chance, casualty, unknown or contingent event whatsoever; or any person who receives, registers, records or forwards or purports or

pretends to receive, register, record or forward in any manner whatsoever, any money, thing or consideration of value, bet or wagered, or offered for the purpose of being bet or wagered, by or for any other person, or sells pools, upon any such result; or any person who, being the owner, lessee or occupant of any room, shed, tenement, tent, booth or building, float or vessel, or part thereof, or of any grounds within this state, knowingly permits the same to be used or occupied for any of these purposes, or therein keeps, exhibits or employs any device or apparatus for the purpose of recording or registering such bets or wagers, or the selling of such pools, or becomes the custodian or depositary for gain, hire or reward, of any money, property or thing of value, staked, wagered or pledged, or to be wagered or pledged upon any such result; or any person who aids, assists or abets in any manner in any of the said acts, which are hereby forbidden, is guilty of a misdemeanor, except when another penalty is provided by law. When an exclusive penalty is elsewhere provided by law for an act hereby prohibited, the permitting of the use of premises for the doing of the act in such case shall not be deemed a violation hereof, nor of section nine hundred and seventy-three of the penal law. As amended L. 1910, c. 488; L. 1934, c. 233, § 4; L. 1937, c. 696, eff. Sept. 1, 1937.

§ 986-c. *Book-making as a felony.*

Any person engaged in book-making to the extent that he receives or accepts in any one day more than five bets or wagers upon the result of any trials or contests of skill, speed or power of endurance of man or beast or upon the result of any political nomina-

tion, appointment or election, or upon any lot, chance, casualty, unknown or contingent event whatsoever, which bets or wagers shall be of such size that the total of the amounts of money paid or promised to be paid to such bookmaker on account thereof shall exceed five thousand dollars, shall be guilty of a felony punishable by imprisonment for a term not exceeding five years. Added L. 1960, c. 548, § 2, eff. Sept. 1, 1960.

Appendix F.

Defendant's Motions.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 65 Crim. 263

UNITED STATES OF AMERICA,

against

RALPH CONTI and DAVID NEWMAN,

Defendants.

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* * * * * *

2. Defendants move for arrest of judgment on the following grounds:

(a) None of the counts in the indictment charge an offense;

(b) The federal gambling statutes on which the indictment is based are unconstitutional as an infringement of the police power reserved to the States, as a violation of the privilege against self-incrimination, and as vague and arbitrary and contrary to the guarantees of the Fifth Amendment.

* * * * * *

DATED: New York, New York, September 15, 1965.

DORSEY, BURKE & GRIFFIN,
Attorneys for Defendant, Ralph Conti.

IRWIN KLEIN,
Attorney for Defendant, David Newman.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 330

RALPH CONTI AND DAVID NEWMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, II. 99-100)[1] is not yet reported. The opinion of the district judge on a pre-trial motion to suppress is reported at 232 F. Supp. 1004 (S.D.N.Y.)

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[1] References to "II" are to Volume II of the certified record consisting of the government appendix below supplemented by proceedings in the court of appeals. References to "I" are to Volume I of the certified record, which consists of petitioners' appendix in the court below.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1966 (II. 111). A petition for rehearing was denied on June 28, 1966 (II. 124-130). The petition for a writ of certiorari was filed on July 11, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the various provisions of the wagering tax statutes infringe upon the Fifth Amendment privilege against self-incrimination.
2. Whether a search warrant was properly issued.
3. Whether the search was properly executed.

STATEMENT

Petitioners were convicted of wagering tax violations after a trial by jury in the United States District Court for the Southern District of New York. Petitioner Conti was convicted on Count 1, which charged a willful attempt to evade and defeat the excise tax on wagers (I. 8-9, 214).[2] Both petitioners were found guilty of the remaining counts which charged willful failure to file and make a return of the excise tax on wagers, willful failure to pay the excise tax on wagers, willful failure to pay the occupational tax imposed on those engaged in the business of accepting wagers, and willful failure to register as engaged in the business of accepting wagers (I. 214).

[2] The jury disagreed and returned no verdict on Count I as to petitioner Newman (I. 214).

Petitioner Conti was sentenced to imprisonment for one year on each count (to be served concurrently) and fined $5,000 on Count 1 and $1,000 on each of the other counts (I. 5). Petitioner Newman was sentenced to imprisonment for three months on each count (to be served concurrently) and fined $250 on each count (I. 4).

The relevant facts show that on Janary 20, 21, and 22, 1964, Federal agents of the Internal Revenue Service conducted a surveillance of Apartment B, 1582 First Avenue, New York City (II. 2-8, 9-13, 13-16, 23-30). During that time they were able to place horse-race wagers, using a code name, by calling TR 9-2265, a telephone located in Apartment B (II. 2-3, 5, 8). By stationing themselves inside the apartment building behind a door leading to a cellar, agents were able to observe petitioners enter or leave Apartment B (II. 4-5, 14-15, 16). Petitioner Conti was observed carrying papers and a small shopping bag (II. 5-6, 8, 10, 11, 15).

On January 22, 1964, a commissioner issued a search warrant authorizing the search of Apartment B for gambling paraphernalia on a finding that there was probable cause to believe that the premises were being used to commit a gambling offense in violation of 26 U.S.C. 4401, 4411, 4412 and 7272 (I. 14-15). The affidavit to support the application for the search warrant, executed by a revenue agent, stated that he had reason to believe that concealed on the premises were gambling paraphernalia used in committing a wagering offense in violation of 26 U.S.C. 4401, 4411, 4412 and 7272. The affidavit continued (I. 13):

> And the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: testimony of a Special Agent of the Internal Revenue Service; who: 1) placed horse bets by telephoning number TR 9-2265; 2) that investigation has disclosed that the telephone number is installed at Ground Floor Apartment B at 1582 First Avenue, New York, New York; 3) that a search of the records of the Internal Revenue Service reveal that none of the persons residing at the aforementioned address have paid the Special Tax imposed by Title 26, United States Code, Section 4411; and 4) that wagers were placed by the Special Agent on January 20, 21, 1964.

Armed with this search warrant, agents Cotter and Riley entered the building (II. 17, 30), the outer door of which was unlocked (II. 9, 12-13, 53, 97). They stationed themselves behind the cellar door, which was also unlocked. By leaving the cellar door slightly ajar they were able to observe Conti open the door to Apartment B with a key. As Conti opened the door, Cotter crossed the hallway, announced in a loud voice that he was a federal agent with a search warrant, and entered the apartment (II. 17, 31). Conti flipped the keys to the floor and followed agent Cotter into the apartment. Agent Riley, who was following, retrieved the keys (II. 18). Meanwhile, agent Cotter discovered petitioner Newman taking a telephone bet (II. 31-32).

A search of the apartment disclosed various betting slips and other gambling paraphernalia including two telephones, one of which bore the telephone number

which Cotter had previously used to place a bet (II. 20-23, I. 15). Petitioners were thereupon arrested (II. 33-34).

Upon being told that he was being arrested for not having a federal tax stamp, Conti said that they "hadn't caught him taking a bet" (II. 20, 34). The agents also seized the sheets listing basketball odds and $1,845 that Conti was carrying into the apartment (II. 33-35). After Newman was arrested he told the agent on the way to headquarters that "he had read of bookmakers being arrested by Treasury agents for not buying the bookie tax stamp" (I. 65).

Agent Cotter thereafter deciphered the code used to record the bets, and he was able to trace the bettors (II. 48-50), some of whom testified as to the bets they had placed (See II. 55-61, 78-84, 84-95). From the paraphernalia seized it was determined that that day's gross wagers amounted to $3,900 (II. 52).

ARGUMENT

1. In *Costello* v. *United States*, No. 41, this Term, this Court has granted certiorari to review the constitutionality of the wagering tax statute insofar as it involves a prosecution for failure to register and pay the occupational tax. Two of the counts on which petitioners were convicted and on which they received separate fines involve the same charges as those involved in *Costello*.

The validity of a prosecution for failure to pay the excise tax is also before this Court on petition for a writ of certiorari in *Grosso* v. *United States*, No. 181,

this Term. For the reasons stated in the government's brief in opposition in that case, we think that a prosecution for failure to pay an excise tax or for evasion of such a tax does not present the problem which is before the Court in *Costello*. This case does, however, also involve a count charging the failure to file a return with respect to the excise tax, a charge not involved in *Grosso*. The decision in *Costello* may possibly have a bearing on that count as well. Consequently, although petitioners did not fully preserve the issue,[3] we agree that it would be appropriate for the Court to defer consideration of this petition until after the decision in *Costello*.

2. Petitioners make several assertions regarding the adequacy of the affidavit on which the search warrant was based. There is no merit to the argument that the statutory section cited in the warrant as having been violated did not relate to the precise offense alleged in the affidavit. That issue was not raised at trial and cannot, in any event, invalidate the warrant. So long as sufficient facts are alleged in the affidavit to show that an offense was being committed, the warrant is valid. A mis-citation of a statute in a warrant, like a mis-citation in an indictment (Rule 7(c) F.R.Crim.P.), does not render it invalid. Petitioners' other contentions regarding the warrant (Pet. 10-12) amount to the exercises in "[t]echnical requirements of elaborate specificity once exacted un-

[3] There was no motion to dismiss before trial. Only after the jury found petitioners guilty, did they, as part of a general objection under the Fourth and Fifth Amendments, mention the privilege against self-incrimination (see I. 229, 230).

der common law pleadings" which this Court disapproved in *United States* v. *Ventresca*, 380 U.S. 102, 108.[4]

3. Petitioners' attack on the execution of the search warrant (Pet. 12-16) is unsound. Petitioners did not assert in the district court that their constitutional rights had been violated by entry into the hallway of the apartment house or into the area leading to the cellar. Indeed, the record shows that these areas were unlocked and freely accessible. Nor is there merit to petitioners' contention that under 18 U.S.C. 3109 there must be, after announcement, an affirmative refusal to allow entry before officers may enter the premises to be searched. In this case, after making their announcement, the agents entered, without using any force, through an open door, and one of the petitioners threw his key to the floor. The purpose of the statute is to prevent the unnecessary use of force to obtain entry, but no valid statutory purpose would be served by requiring a formal refusal before officers may enter.

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[4] *Sgro* v. *United States*, 287 U.S. 206 is inapplicable. The present affidavit stated that the wagers were placed on January 20 and 21. Thus the search warrant issued on January 22 was, unlike *Sgro*, sufficiently close in time to support probable cause.

CONCLUSION

For the foregoing reasons, we believe that action on the petition for a writ of certiorari should be deferred until after this Court's decision in *Costello* v. *United States*, No. 41, this Term.

Respectfully submitted,

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AUGUST 1966.

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IN THE

SUPREME COURT OF THE UNITED STATES.

1967

BERTRAM S. ROSS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

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No. .....

IN THE

SUPREME COURT OF THE UNITED STATES.

BERTRAM S. ROSS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals For the Sixth Circuit.

The petitioner prays that a writ of certiorari be issued to review a judgment and order, entered March 2, 1967, by the United States Circuit Court of Appeals for the Sixth Circuit in Case No. 17062 of that court sustaining the conviction of the petitioner by the United States District Court for the Middle District of Tennessee for violation of the Federal Travel Act, Section 1952, Title 18, U. S. C.

OPINION BELOW.

The opinion of the Court of Appeals for the Sixth Circuit has not been generally reported, but a copy thereof is appended to this petition as Appendix A.

STATEMENT OF JURISDICTION.

The United States District Court for the Middle District of Tennessee, Nashville Division, sitting without a jury, entered a judgment of guilty against the petitioner under

a one count indictment on charges of violation of 18 U. S. C. 1952, in that he wilfully caused others to use the United States mail to send to him from Chicago, Illinois, to Nashville Tennessee, a certain sports publication with the intent to "promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, a business establishment involving gambling in violation" of the laws of Tennessee. The United States Court of Appeals for the Sixth Circuit affirmed this judgment of conviction on March 2, 1967. Jurisdiction to entertain this petition is conferred on the Supreme Court of the United States by 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

1. Is the filing by a defendant of a monthly wagering excise tax return, mandatorily required by 26 U. S. C., § 4401 and § 4403, evidence which may be used to convict him of violating the Federal Travel Act, 18 U. S. C. 1952?

2. Is the possession by a defendant of a Federal Wagering Tax Stamp as required by 26 U. S. C., § 4411 and § 4901 (c), evidence which may be used against him to convict him of violating the Federal Travel Act, 18 U. S. C. 1952?

STATUTES INVOLVED.

The statutes involved are 18 U. S. C. 1952, 26 U. S. C., § 4401 and § 4403, and 26 U. S. C., § 4411 and § 4901 (c), which are set forth in more detail in Appendix B to this petition.

STATEMENT OF THE CASE.

The evidence in this case is substantially as stated in the opinion of the Court of Appeals and the sole question is whether the evidence is sufficient to sustain the conviction. The petitioner did not testify at the trial nor was

any testimony submitted on his behalf. The only evidence introduced by the respondent was the testimony of two FBI agents who stated that they found certain publications in the yard of the petitioner's home which, as described in a bill of particulars, was identified as follows:

> "1. The name of the publication is the Angel-Kaplan Sports Publication. The date if (sic) issue is unknown, but is Voluume XXXV—'Special Bowl Edition'; as the description, the publication contains a schedule of bowl games for 1964-65, a photostatic copy of which is attached hereto."

There was no proof that the petitioner used the Angel-Kaplan Publication referred to in the taking of any specific wagers or bets. There was no specific evidence to show that the said Angel-Kaplan Publication was used to aid or facilitate the substantial acts of state law violation. The trial court and the Circuit Court of Appeals inferred its use to facilitate substantial acts of state law violation from the fact that one of the petitioner's businesses was taking bets on ballgames. The only evidence of petitioner's business of taking bets was his testimony on the motion to suppress the evidence which was extra-judicial admissions to one of the FBI agents.

Since the petitioner's extra-judicial admissions require corroboration before they may be used as evidence against him, **U. S. v. Calderon**, 348 U. S. 160, the Circuit Court of Appeals held that ". . . **substantial evidence to corroborate such admissions is found in appellant's possession of Federal Wagering Tax Stamps and his filing of monthly Wagering Excise Tax Returns and the fact that an envelope containing the rundown sheets addressed to the appellant was found on his premises**, . . ." (App. A).

It is clear from the opinion of the Court of Appeals that there would have been insufficient corroborating evidence upon which to base a conviction if the petitioner's

possession of Federal Wagering Stamps and the fact of his filing monthly Wagering Excise Tax Returns had not been considered as evidence.

REASONS FOR GRANTING THE WRIT.

The filing of Wagering Excise Tax Returns and obtaining Federal Wagering Tax Stamps is mandatorily required of those engaged in such business by the provisions of Title 26, U. S. C., § 4401 and § 4403 and of § 4411 and § 4901 (c) respectively. The use of such stamps and the fact of the filing of such returns, mandatorily required by a revenue law, in a criminal prosecution is a violation of the petitioner's rights against compulsory self-incrimination under the Fifth Amendment to the Constitution of the United States.

In the cases of **Frank Costello v. United States**, 383 U. S. 942 (352 F. 2d 848), and **Grassia v. United States**, 354 F. 2d 27, this Court has under consideration the constitutionality of the tax on wagering imposed by Title 26, U. S. C., § 4401 and the tax on persons engaged in wagering imposed by 26 U. S. C., § 4411.

The petitioner respectfully asserts that if a revenue law is unconstitutional because the reporting and registration requirements in such law compel those subject to it to give statements which may be used against them in a criminal prosecution, then, by the same reasoning, the use of such reporting and registration as evidence to support a criminal conviction is also unconstitutional. A conviction, the validity of which depends upon such evidence, should not be permitted to stand.

The use of the reporting and registration requirements of the revenue laws relating to wagering are, in legal effect, similar to the registration and reporting required under the Subversive Activities Control Act of 1950, 50 U. S. C., § 786 (d) (4) which the Court held to be uncon-

stitutional in **Albertson v. Subversive Activities Control Bd.**, 382 U. S. 70, 15 L. ed. 2d 165, November 15, 1965.

In **Albertson v. Subversive Activities Control Bd.**, *supra*, this Court, in distinguishing Albertson from the ruling in **U. S. v. Sullivan**, 274 U. S. 259, 71 L. ed. 1037, said: "In Sullivan the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially non-criminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admissions of a crucial element of a crime" (At p. 79).

This Court in **Frank Costello v. United States**, 383 U. S. 942, 16 L. ed. 2d 205, on March 21, 1966, granted a writ of certiorari on the basis of this same question. In **Frank Costello v. United States**, *supra*, the Court granted the writ of certiorari for consideration of the following question:

> "1. Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court especially in view of its recent decision in Albertson v. Subversive Activities Control Bd., 382 U. S. 70, 15 L. Ed. 2d 165, 86 S. Ct. 194 (1965), overrule U. S. v. Kahriger, 345 U. S. 22, 97 L. Ed. 754, 73 S. Ct. 510 (1953) and Lewis. v. United States, 348 U. S. 419, 99 L. Ed. 475, 75 S. Ct. 415 (1955)?"

This petitioner submits that until a definitive determination is made by this court concerning the question of whether or not the Federal Wagering Tax Statutes violate the petitioner's privilege against self-incrimina-

tion guaranteed by the Fifth Amendment this petitioner's case should remain pending or should be heard for the purpose of determining the questions presented in this petition.

The petitioner's case, though presenting the same basic questions as the other cases now pending before this court and referred to above, presents a different facet of the same question.

The petitioner's case presents a clear example of the use of a revenue statute to force incriminating statements from a person which may be used, and are essentially for the purpose of being used, in criminal investigation and criminal prosecution. The petitioner submits that this device, using revenue statutes to obtain evidence in the aid of criminal prosecution on non-revenue charges, is in violation of the Fifth Amendment to the Constitution of the United States and is designed as a subterfuge to circumvent the constitutional restrictions on self-incriminaton.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A.

(Filed Mar. 2, 1967. Carl W. Reuss, Clerk.)

No. 17,062

United States Court of Appeals
For the Sixth Circuit.

United States of America, Plaintiff-Appellee, v. Bertram S. Ross, AKA Bert Ross, Defendant-Appellant.	On Appeal from the United States District Court for the Middle District of Tennessee.

Decided March 2, 1967.

Before: O'Sullivan and Celebrezze, Circuit Judges, and Cecil, Senior Circuit Judge.

Cecil, Senior Circuit Judge. This is an appeal from a judgment of conviction in the United States District Court for the Middle District of Tennessee. The appellant, Bertram S. Ross, was indicted on a one-count indictment for violation of the Federal Travel Act, Section 1952,[1]

[1] "(a) Whoever * * * uses any facility in interstate * * * commerce, including the mail, with intent to—

"(3) * * * promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs * * * (3) * * * shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means '(1) any business enterprise involving gambling * * * offenses in violation of the laws of the State in which they are committed * * *"

Title 18, U. S. C., The appellant waived jury trial and was tried to the court. Upon being found guilty he was placed on probation for two years and sentenced to pay a fine of $5,000.

The indictment,[2] stripped of its formal language, charges that the appellant on or about December 28, 1964, used the mail or caused others to mail a sports publication from Chicago to Nashville with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on a business enterprise involving gambling, in violation of Tennessee law, and that thereafter he performed acts to carry out his intent. In a bill of particulars, the publication alleged in the indictment was identified as follows:

> "1. The name of the publication is the Angel-Kaplan Sports Publication. The date if (sic) issue is unknown, but is Volume XXXV—'Special Bowl Edition'; as the description, the publication contains a schedule of bowl games for 1964-65, a photostatic copy of which is attached hereto."

The evidence is virtually undisputed and the question is whether it is sufficient to sustain the conviction. The appellant did not testify at the trial nor was any testimony

---

[2] "On or about the 28th day of December, 1964, in the Nashville Division of the Middle District of Tennessee, the defendant, Bertram S. Ross (also known as Bert Ross), did use and did wilfully cause others to use a facility in interstate commerce, that is, he did wilfully cause a sports publication to be mailed from Chicago, Illinois, to Nashville, Tennessee, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involving gambling, in violation of Tennessee Code Ann., Section 39-2032, of the Statutes of Tennessee, and that thereafter the defendant did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of the said unlawful activity.

"In violation of Title 18, United States Code, Sections 1952 and 2."

submitted on his behalf. The testimony of the appellant on the motion to suppress evidence was made a part of the record of the trial without objection of counsel for the appellant.

On January 11, 1965, Francis W. Norwood and Bill Sheets, special agents of the FBI, knowing that the appellant had a Federal Wagering Tax Stamp, went to his residence to interview him with respect to gambling. The appellant was not home and as the agents walked across the rear of his lot, after viewing a neighboring house, they discovered the publication, which is the subject of the indictment, in an overturned garbage can. They found a number of papers which were identified as "Angel-Kaplan Sports Publications". Some were lying on the ground and some were in an envelope bearing a postmark, "Chicago, Illinois, December 28, 1964". The envelope was addressed to B. Ross at a post office box in Nashville, Tennessee. These publications had schedules of football games that were played during the latter part of December and the early part of January, including bowl games played on New Year's Day.

They took these publications with them and later, on or about March 12, 1965, Agent Norwood and Special Agent Charles J. Honeter interviewed the appellant concerning them. The appellant said he had two businesses, one of which was booking bets on ball games. He said that he had had a Federal Wagering Tax Stamp for the year ending June 30, 1964, and one for the current year running to June 30, 1965. He further said that he had been in the business of accepting wagers during all of this time. This testimony concerning the business of the appellant was corroborated by the introduction of Wagering Excise Tax Returns for the period from July 1, 1963, to March of 1965.

On the motion to suppress evidence, the appellant identified the document which was the subject of the indict-

ment and said that he had had it in his possession in January and that it was a schedule of certain bowl and professional football games. The appellant testified that he had been getting these publications for six or eight months. The publications were referred to as "run down sheets" and the appellant admitted to the special agents on the interview that he subscribed to them. He received them for each particular sports season and he was presently getting them for the basketball season. He ordered them through order blanks that Angel-Kaplan sent out through the mail and he paid twelve cents a copy for them. He further admitted to the special agents that he used them for keeping up with the games that were being played. He could make up this schedule of games himself but it was more convenient to use the ones that were already made up.

Witness Norwood was shown Government's Collective Exhibit No. 1, introduced at the hearing on the motion to suppress, and identified it as containing the documents that he and Bill Sheets took from the appellant's premises on January 11, 1964. He further identified one of the documents as containing a schedule of bowl games called "Special Bowl Edition, Volume XXXV" as described in the Bill of Particulars.

Considering this testimony in the terms of the charge in the indictment, we find that it supports the District Court's judgment of guilty. The appellant used the mail, a facility of interstate commerce, and caused it to be used on or about December 28, 1964, for the receipt of Angel-Kaplan Sports Publications, including the Bowl Edition described in the indictment. This is evidenced by his testimony that he had the one in question in his possession in January 1965, that he was a subscriber to the publication at the time and the inference that can be drawn from finding the envelope addressed to the appel-

lant on his premises. That the appellant was in the business of booking bets and wagers on athletic games in season is beyond question. This is shown by his own admission and by his Federal Wagering Excise Tax Returns. The Court takes judicial notice that this form of gambling is in violation of the laws of Tennessee. Since he was in this business of promoting and carrying on gambling through taking wagers and bets on games continuously from July, 1963, it is abundantly clear that he performed acts of promotion and gambling subsequent to December 28, 1964.

The one remaining question is whether the appellant used the document described in the indictment to facilitate the promotion and carrying on of his business. While we hold that it is not necessary to show the use of this document in the taking of a specific wager or bet, we do hold that the evidence must show its use to facilitate the subsequent acts of state law violation. From all of the evidence in this case to the effect that the appellant was a subscriber to the publication, that he was continuously in the business of taking wagers and bets, that he took bets on games in season and that he used this publication for his convenience in his business, the inference, in absence of any evidence to the contrary, is inescapable that he used the document described in the indictment for the bowl games of the 1964-65 season. The situation here is essentially similar to *United States v. Azar*, 243 F. Supp. 345, in which District Judge Talbot Smith said, at p. 350:

> "In short, here is a device, the tip sheet, serving a purpose of catering to those wishing to participate in the numbers racket. It suggests and advises as to successful participation in the unlawful operation itself. It is stipulated, indeed, that it actually does both promote and stimulate such gambling. Upon these facts it would be perversion of both language and

> logic for us to hold that such a device does not 'facilitate' the unlawful operation the promotion of which it serves, and the furtherance of which it stimulates."

See also, *United States v. Ryan*, 213 F. Supp. 763 (D. C. Colo.); *United States v. Teemer*, 214 F. Supp. 952 (N. D. W. Va.).

Appellant's contention that his extra-judicial admissions to Agent Norwood cannot be considered because they were uncorroborated, *United States v. Calderon*, 348 U. S. 160, is unfounded. Substantial evidence to corroborate such admissions is found in appellant's possession of Federal Wagering Tax Stamps and his filing of monthly Wagering Excise Returns, in the fact that an envelope containing the run down sheets addressed to the appellant was found on his premises, and in appellant's own testimony given under oath at the hearing on the motion to suppress evidence.

The judgment of conviction is affirmed.

APPENDIX B.

Title 18, U. S. C. A.

Section 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

* * * * * * *

Title 26, U. S. C. A.

Section 4401. Imposition of tax.

(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

* * * * * * *

Title 26, U. S. C. A.

Section 4403. Record requirements.

Each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable, in addition to all other records required pursuant to section 6001 (a).

* * * * * * * *

Title 26, U. S. C. A.

Section 4411. Imposition of tax.

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

* * * * * * * *

Title 26, U. S. C. A.

Section 4901. Payment of tax.

(a) Condition precedent to carrying on certain business.—No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), 4461 (2) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marihuana) until he has paid the special tax therefor.

# # # # # # #

(c) How paid.—

(1) Stamp.—All special taxes imposed by law shall be paid by stamps denoting the tax.

No. 70

In the Supreme Court of the United States

OCTOBER TERM, 1957

PETER S. HOSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 77

BERTRAM S. ROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of using the mails to facilitate a gambling enterprise, in violation of 18 U.S.C. 1952. On November 19, 1965, he was sentenced to two years' probation and fined $2,000. The court of appeals affirmed (Pet. App. A).

The evidence, which is not in dispute, showed that on January 11, 1965, two F.B.I. agents obtained an envelope and several sheets of paper from an overturned trash can on an open lot adjacent to petitioner's house (A. 25a, 29a).[1] The papers were discovered to be "run-down sheets," on which were

[1] "A." refers to petitioner's appendix in the court below, filed with the Clerk of this Court.

268-721—67

printed schedules of football games for the week ending January 10, 1965, and of the bowl games played on or about January 1, 1965. In the envelope were several run-down sheets for games played during the week ending January 3, 1965 (A. 27a). The envelope was machine stamped, and bore markings indicating that it had been mailed on December 28, 1964, from Chicago, Illinois to petitioner in Nashville, Tennessee (A. 25a–27a). The agents also found a discarded slip of paper on which had been noted the names of certain teams scheduled to play football games and the anticipated "point spread," the number of points by which the favorite was expected to win. Some of the printed run-down sheets also contained handwritten notations of point spreads (A. 27a).

At trial, one of the agents who had obtained the evidence testified that two months after the search he had interviewed petitioner (A. 19a). After advising petitioner of his right to counsel and to remain silent, and that anything he stated could be used against him in a court of law, the agent asked what business petitioner engaged in. Petitioner replied that he had two businesses, one of which was "booking" bets on ball games (A. 20a). On further questioning, petitioner told the agent that he had subscribed to the run-down sheets and was at that time receiving them through the mails. Petitioner indicated that he used the sheets as an expeditious means of following the progress of each game as it was played (A. 22a–24a). Petitioner also acknowledged that he had a current wagering tax stamp, and had been filing the required

monthly excise tax returns (A. 20a–21a). Petitioner's applications for registration (Treasury Department Form 11–C) and his wagering excise tax returns (Treasury Form 730) for the period July 1, 1963 to March, 1965, were introduced in evidence (A. 16a–19a).

The sole question presented by the petition for certiorari involves the admissibility in evidence of the federal registration statements and wagering excise tax returns. Petitioner did not object to their admission at trial, except insofar as they reflected activity in which he had engaged prior to the date of the indictment (A. 18a). Nor was this issue raised in the court of appeals.

Since the issue was not properly preserved, there is no occasion to consider it at the *certiorari* stage of this case. See *United States* v. *Indiviglio*, 352 F. 2d 276 (C.A. 2), certiorari denied, 383 U.S. 907.[2]

[2] Had the issue presently raised been properly preserved, its resolution might be controlled by the decisions in *Marchetti* v. *United States*, No. 38, and *Grosso* v. *United States*, No. 181, both last term, restored to the docket for reargument as Nos. 2 and 12, this Term. If, in those cases, the Court's prior decision in *United States* v. *Lewis*, 348 U.S. 419, is followed, petitioner's conviction would appear to involve no violation of his Fifth Amendment rights. Should the Court, however, adopt a use-restriction rule, as alternatively suggested in the government's briefs in Nos. 41 and 181, the challenged evidence would be excludable. See the government's brief in No. 41, last Term, p. 24; see also the government's memorandum in *Raincater* v. *Florida*, No. 555, last Term (No. 18, this Term).

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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JULY 1967.

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IN THE

Supreme Court of the United States

October Term, 1967.

No. ~~1346~~ 121

JOSEPH H. DONLON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

October Term, 1966.

No.

JOSEPH H. DONLON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

I. OPINIONS BELOW.

(A) The opinion of the United States Court of Appeals for the Third Circuit bears the date January 17, 1967, is a Per Curiam opinion, and is not yet reported. A copy is appended hereto (1A, *infra*).

(B) The opinion of the United States Court of Appeals for the Third Circuit as to the Petition for Rehearing bears the date March 3, 1967, and is not yet reported. A copy is appended hereto (3A, *infra*).

(C) The opinion of the United States District Court for the District of Delaware bears the date July 14, 1966, and is not yet reported (Appellant's Appendix 29a).

II. JURISDICTIONAL GROUNDS.

This petition seeks a writ of certiorari to the United States Court of Appeals for the Third Circuit with respect to its judgment dated and entered on March 29, 1967, which judgment affirmed the judgment of the United States District Court for the District of Delaware of August 4, 1966.

Jurisdiction of this Court is predicated upon 62 Stat. 928(1) (28 U. S. C. A. § 1254(1)).

III. ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

On April 7, 1967, Honorable William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States ordered that the time for petitioner filing a petition for writ of certiorari be extended to and including May 3, 1967, without prejudice to the Court's consideration as to whether the application was timely received.

IV. QUESTIONS PRESENTED.

A. Were the defendant's rights at trial substantially prejudiced by the failure of the Court to require production of requested reports for in camera examination?

B. Were the defendant's rights at trial substantially prejudiced by the refusal of the Court to order certain requested memoranda be furnished defendant for his inspection and use in cross-examination?

C. Were the defendant's rights at trial substantially prejudiced by the receipt into evidence of speculative testimony identifying code names as alleged numbers writers of the defendant?

D. Were the defendant's rights at trial substantially prejudiced by the refusal of the Court below to permit impeachment testimony in evidence?

V. CONSTITUTIONAL PROVISIONS, ETC. INVOLVED IN THE CASE.

Article V, Amendments to the Constitution of the United States. No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI, Amendments to the Constitution of the United States. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U. S. C. A. § 3500, the text of which is set forth in the appendix hereto (4A, *infra*).

VI. STATEMENT OF THE CASE.

On May 7, 1965, the Grand Jury filed an Indictment charging the defendant with violations of 26 United States Code 7201 and 7203. In Count I, the defendant was charged with willfully failing to pay the excise tax required by 26 United States Code 4401 on wagers accepted in the month of June 1964. In Count II, the defendant was charged with willfully failing to pay the special occupational tax required under 26 United States Code 4411. In Count III, the defendant was charged with willfully failing to register and furnish information to the District Director of Internal Revenue as required by 26 United States Code 4412.

On May 17, 1965, the defendant appeared with counsel and entered a plea to each Count of not guilty.

On May 24, 1965, trial commenced in the United States District Court for the District of Delaware. The trial concluded on May 27, 1965, the jury at that time returning verdicts of guilty on each Count.

On June 21, 1965, a Motion was filed on behalf of the defendant for Judgment of Acquittal, or in the Alternative, for New Trial.

On July 14, 1966, the above Motion was denied by the Honorable Caleb R. Layton, 3rd, in an Opinion even date.

On August 4, 1966, the defendant was senteced to be incarcerated for the period of one and one-half years as to the verdict under Count I. As to Counts II and III, the defendant was sentenced to be incarcerated for one year each as to each Count, these sentences to run concurrent one with the other, and to run concurrent with the sentence on Count I. Judgment and commitment were entered.

On August 10, 1966, a Notice of Appeal was filed on behalf of the defendant.

On January 6, 1967, the Appeal was argued by Counsel before the United States Court of Appeals for the Third Circuit.

On January 17, 1966, the United States Court of Appeals for the Third Circuit filed its opinion affirming the judgment of the United States District Court for the District of Delaware.

On February 14, 1967, appellant filed a Petition for Rehearing.

On March 3, 1967, the Petition for Rehearing was denied with an opinion filed the same date.

This is appellant's petition for a writ of certiorari.

Statement of Facts.

During May and June, 1964, defendant Donlon was placed under surveillance by Agents of the Intelligence Division, Internal Revenue Service. Defendant was observed to follow a routine which included a series of visits to various locations in and around the City of Wilmington during the morning, a short stop at his own store, Don's Gift Shop, and a return to his home. In the afternoon, he would return to his own store. In the course of this routine, he was allegedly observed to have conducted a series of transactions with other persons involving slips of paper or money or both.

On June 1, 1964, an employee of the Audit Division of the Internal Revenue Service visited defendant and allegedly explained the requirements of the Federal Wagering law including stamp purchase, registration requirements, and the 10% excise tax on wagers. Defendant neither purchased the stamp, registered, nor paid the required excise tax on gross wagers.

On Friday, June 19, 1964, pursuant to search warrants issued for that purpose, a group of Federal Agents conducted a search of defendant's house. They found three pieces of paper with names and columns of numbers in a specially constructed shelf containing a secret hiding place. They also found a slip of paper with names and columns of numbers under the cushion of defendant's chair. The

United States takes the position that these sheets of paper represented the records of defendant's wagering business during the period of June 13 to June 19, 1964, disclosing an operation involving approximately sixty numbers writers employed by defendant.

Defendant was then arrested, pursuant to a warrant, and searched. He was found to have $5,875.00 in cash on his person. He stated that the currency was his, and said that $333.00, taken from one particular pocket, was proceeds from his store, Don's Gift Shop. When questioned about the remainder of the money, he refused to answer. He denied being in the business of accepting wagers. He denied knowledge of the hiding place in the shelf, of the papers it contained, or of the sheet of paper under the cushion of his clair. He also refused to answer when questioned further.

During the surveillance and investigation, the agents had attempted on more than one occasion to have the defendant accept work from a purported numbers writer, who was in fact an informer. Although the ploy had been successful in all concurrent investigations, the defendant Donlon refused to accept any of the offered work.

VII. ARGUMENT.

A. The Defendant's Rights at Trial Were Substantially Prejudiced by the Failure of the Court to Require Production of Requested Reports for in Camera Examination.

Agent Toscano testified on his direct examination that during the months of May and June, 1964, he investigated at least four Wilmington wagering businesses including the one allegedly operated by the defendant. In connection with these investigations, including his investigation of the wagering business allegedly operated by the defendant, Toscano obtained and studied banking records (10a). After examining Government Exhibits 2, 3, 4 and 5 (previously identified by the government as banking records in the defendant's possession when he was arrested), Toscano testied that these were similar to banking records with which he was familiar (11a). He stated further that the amounts of money which appear to be reflected by the records were consistent with the average "weekly take" of a 60 writer banking operation (11a; 12a). The United States Attorney represented to the Court that the purpose of the direct examination was to demonstrate that the records found in the defendant's possession were banking records (12a). Finally, Toscano testified that the amount of money found on the person of the defendant when arrested was consistent with his being a banker (12a).

There is no doubt that the subject matter of Toscano's testimony was the identification of the defendant Donlon as a numbers banker during the months of May and June, 1964, a function the jury had to be convinced the defendant discharged during the months in question as a condition precedent to their return of guilty verdicts.

It is also clear that one of the subjects of Toscano's direct examination was that he had investigated a gambling

business allegedly operated by the defendant in May and June of 1964.

On cross-examination, with immediate reference to this investigation or surveillance admittedly conducted by Toscano, he was asked whether he made or kept any records or memoranda. Upon receipt of an affirmative answer, application was made to the Court for production of these records and memoranda pursuant to the provisions of 18 U. S. C. § 3500, the Jencks Act (12a). Defense counsel was assured promptly by the Court that the requested material would be provided (13a).

Certain of these materials requested were furnished by the government and certain others were refused (15a-28a, 36a-40a). The basis of the refusal was the government assertion that these were unrelated to the subject matter of Toscano's direct examination (18a, 22a).

The impasse was brought to the attention of the Court with the request that the Court order production of all memoranda and records of Toscano's May and June surveillances of the defendant Donlon for the Court's own inspection. After lengthy discussion, only two memoranda were produced for the Court's inspection. These were the only memoranda of which the defendant had specific knowledge. The defendant had reason to believe and continues to so believe that the Government was then in possession of other memoranda of Toscano relating to this specific surveillance. The Court refused to order production of any further material unless counsel could identify specifically the matter sought. The materials requested were those relating to the surveillance which Toscano stated on direct examination he had conducted. The limits of the request were made abundantly clear by counsel to no avail.

The defendant petitions that the sentence be vacated and the case remanded to the District Court for further hearing as required by 18 U. S. C. § 3500(c). The Court below erred in refusing defendant's request for an in camera inspection of requested records and memoranda

of witness Toscano of his May, June, 1964, investigation of the defendant. *United States v. Keig,* 320 F. 2d 634, 637 (7th Cir., 1963); *Ogden v. United States,* 303 F. 2d 724, 737 (9th Cir., 1962); *Bary v. United States,* 292 F. 2d 53, 58 (10th Cir., 1961); *Holmes v. United States,* 271 F. 2d 635, 638 (4th Cir., 1959).

B: The Defendant's Rights at Trial Were Substantially Prejudiced by the Refusal of the Court to Order Certain Requested Memoranda Be Furnished Defendant for His Inspection and Use in Cross-Examination.

The witness Toscano stated during his direct examination that he conducted an investigation or surveillance of alleged wagering activities of the defendant during the months May and June of 1964. Having admitted that he compiled memoranda in connection with his surveillance, the defense request that these be produced for inspection and possible use in preparing cross-examination was initially granted by the Court. The Court later reversed itself having determined the material not to be producible. The basis for its decision is unclear both in the record and in the opinion. Two grounds are discussed; that the matters sought do not relate to the subject matter of Toscano's direct testimony, and that they could not serve to impeach (16a-28a, 36a-39a). It appears to the writer that the Court gives most prominence to its determination that these materials could not impeach the witness. If this was the basis for decision, the defendant was substantially prejudiced by the Court's error in considering the question of impeachment. The sole determination the Court is permitted by the statute is that of relationship to direct testimony. If the Court upon its in camera examination determines that the memoranda sought do not relate to subject matter of the witnesses' direct examination, the Court should refuse to order production. On the other hand, should the Court determine after in camera inspec-

tion that some or all records requested do so relate it must order production. The question of impeachment does not come before the Court for a ruling except in passing upon government objection to cross-examination the purpose of which is to impeach. "The question of whether an otherwise producible statement is useful for impeachment must be left to the defendant." *Ogden v. United States,* 303 F. 2d 724, 737 (9th Cir., 1962). "Whether the statements so relate to prosecution testimony is a decision which is vested not in the government but in the trial judge with full opportunity for appellate review. Once this question has been determined, whether the statements may be useful for purposes of impeachment is a decision which rests, of course, with the defendant himself." *Scales v. United States,* 367 U. S. 203, 258, 81 S. Ct. 1469, 1501 (U. S. S. C., 1961).

The Court concluded in its opinion that Toscano testified only as to two matters; his identification of exhibits as being similar to banking records, and his computation of the total amount of wagers represented by these records. This conclusion is error in that it has already been shown that Toscano conducted a surveillance of the defendant in May and June of 1964 and that his expertise in the Wilmington area was based to some extent on this surveillance. These matters were testified to on direct examination.

It is submitted respectfully that the Court's view of the concept "subject matter" was oppressively restrictive. In *Ogden v. United States,* 303 F. 2d 724, 740 (9th Cir., 1962), the Court, in remanding for further hearing, described portions of a statement as

> ". . . relevant to the subject matter of cross-examination only in the broadest terms, but the test to be applied is not whether the material would be 'relevant' in the evidentiary sense, but only whether it relates generally to the events and activities testified to. The problem is not whether a question framed precisely in the terms of the withheld information would relate to

> the subject matter of the direct examination, but rather whether the withheld material might be useful in framing questions which would be relevant to that subject matter . . . . Doubts are to be resolved in favor of disclosure . . . . ."

The District Court in its opinion in *United States v. Hilbrich,* 232 F. Supp. 111, 129 (D. C. N. D. Ill., E. D., 1964) recommended that ". . . a very liberal interpretation of the cognomen 'related' should be used."

As stated earlier, only two records were produced by the government. The Court failed to require of the United States Attorney any further production since, as stated in the opinion, "The government insisted that all relevant Jencks material had been produced . . ." (37a). Having shifted its own burden to the prosecution, the Court clearly erred in not making its own determination. *United States v. Chapman,* 318 F. 2d 912, 914 (2nd Cir. 1963); *Bary v. United States,* 292 F. 2d 53, 58 (10th Cir., 1961).

Although the Court's statements as to whether the witness could be successfuly impeached may be debated prematurely at this time, the defendant will set forth his position in regard to the relevant portion of the opinion (37a-39a).

The Court stated that Toscano testified only to his interpretation of records found at the defendant's home, that these records were similar to bankers records, that the money on defendant's person was indicative of banking activities, and to his computation of the total amount of wagers reflected in these records. The Court continued by stating that Toscano did not conclude that the defendant was a numbers banker. On the other hand, defendant contends that the necessary inference and intention of Toscano's direct examination was that the defendant was a numbers banker during the relevant period of time.

The Court further found the defense motion without merit since defendant was aware of some of the material

from other sources, from the affidavit attached to a search warrant. This contention, of course, has no bearing with respect to the materials which were not produced for the Court. As for the two records which were produced for the Court, the Court made no attempt to satisfy itself whether the search warrant affidavit contained, more, less, or different material than that in the agents' records.

Finally, the Court found no impeachment would be possible—at least as to the two records it examined—in that they dealt with the agents' surveillance during May, 1964, and the government had been precluded from offering testimony as to that surveillance. The defense position was then, as now, that the government had not chosen to accuse the defendant of May violations, and, as a result, had limited itself in the offer of proof. The limitation of time that determines the admissibility of evidence offered against the defendant, a party, to establish guilt, differs from and is more narrow than that controlling as to the impeachment of a witness. For example, had the defendant taken the witness stand and testified that he had not been in Wilmington during May 4, 1964, the Court's exclusory ruling would no longer have prohibited government testimony of the May surveillance.

A conceptual difference exists in the relationship between the time of events to guilt as charged and the time of events to the credibility of a witness. The former is delimited by the indictment; the latter, by considerations of relevance and logic. "Impeaching evidence is admitted only for the purpose of attacking the credibility of the witness and not as substantive evidence of its truth . . .", such as is evidence offered to convict. *Wharton's Criminal Evidence,* twelfth edition, Volume III, 1965, at page 317.

The defendant should be permitted to use the materials requested to impeach the witness. It is stated in *Wharton* (*supra,* 325) that "The defendant may prove any fact tending to show that a witness is a partisan of the state" and that "It is proper to admit evidence of any acts or

circumstances which are inconsistent with the relevant testimony of the witness" (*supra,* 330). If the ruling of the Court was correct that the defendant could not impeach by examining as to events occuring in May, 1964, because the government was precluded from offering evidence as to that month, this would mean, for example, that the witness could not be impeached by proof of his bad character or felony convictions previous to June 1964. To state it thus is to show the patent error of the Court.

C. The Defendant's Rights at Trial Were Substantially Prejudiced by the Receipt Into Evidence of Speculative Testimony Identifying Code Names as Alleged Numbers Writers of the Defendant.

Certain of the government exhibits identified as banking records of the defendant contained lists in code. Witnesses for the United States were permitted to testify that these initials and code names might represent numbers writers (3a-9a). The witnesses were permitted to go further and speculate as to the identity of some of these alleged writers.

The names suggested by the witnesses were of numbers writers widely and well-known in this community to be involved in policy writing.

This testimony was objected to and should have been refused by the Court at the outset because of its obvious and admitted speculative nature. Secondly, it should have been rejected as being too remote for purposes of relevancy in that no expert was able to testify that any of these writers were in fact involved in gambling operations during the period of time charged in the Indictment. Further, no expert was able to link any of these writers with the defendant.

With the highly speculative and remote character of this evidence, the jury was erroneously permitted to speculate upon the witness' own speculation. Attention must be drawn to Bullen's testimony. The witness was asked

whether any of the abbreviations "suggest" names of persons; he admitted that he was less familiar with persons in the business in Wilmington; he was asked again what names he thought the abbreviations "might represent"; he stated "They would indicate certain people to me, but they may not be these people" and further that certain initials or nicknames "could be" one person or another.

Not only was it error to permit government witnesses to offer testimony so speculative in nature as to be prejudicial for this reason alone, but error was compounded by permitting the witness Bullen to identify the records as those of a banker. The basic criteria for identifying these records as those of a banker inheres in the hopeful assertion by the expert witnesses that certain initials and code names "might represent" the names of numbers writers in a banking operation.

Thus, not only should this testimony of Bullen and Coen have been refused by the Court, but, with this out of the record, the testimony describing these records as those of a banker should have been stricken.

D. Conclusion.

It is respectfully submitted that the petition for certiorari be granted and the judgment of the lower court be reversed.

Respectfully submitted,

EMMETT J. CONTE, JR.,
Attorney for Petitioner.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16163

UNITED STATES OF AMERICA,

v.

JOSEPH M. DONLON,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued January 6, 1967

Before McLAUGHLIN, SMITH and FREEDMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed January 17, 1967)

PER CURIAM.

Appellant was convicted of violations of the Federal Wagering Laws, 26 U. S. C. Sections 7201 and 7203.

We find not error under the trial circumstances in the Court's denial of appellant's requests for certain material, purportedly under the authority of the Jencks Act, 18 U. S. C. Section 3500, in one instance for the Court's inspection and in a second instance to be furnished defendant for his inspection and use on cross-examination. Also under the trial circumstances we find no substantial error in the admission of the identification testimony, the only remaining point advanced on this appeal.

The judgment of the District Court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16163

UNITED STATES OF AMERICA,

v.

JOSEPH M. DONLON,
Appellant.

(D. C. Criminal No. 1694)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: MCLAUGHLIN, SMITH and FREEDMAN, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, of August 4, 1966, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN,
Clerk.

January 17, 1967.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16163

UNITED STATES OF AMERICA,

v.

JOSEPH M. DONLON,

Appellant.

SUR PETITION FOR REHEARING.

Present: STALEY, *Chief Judge* and MCLAUGHLIN, HASTIE, SMITH, FREEDMAN and SEITZ, *Circuit Judges.*

The sole contention of appellant's petition for rehearing is that our per curiam opinion heretofore filed in this appeal did not specifically mention a particular excerpt from the second and final point as argued on behalf of appellant. That item concerned the defense calling one of the Internal Revenue Agents as a witness and insisting on cross-examining him on a theory of impeachment. The Court, with counsel, explored the whole related area of evidence carefully, concluded that there was no impeachment basis presented and upheld the objection to the question. We have gone over the same ground at length. We find that the trial Judge at the very least was not clearly wrong in his ruling.

The petition for rehearing will be denied.

By THE COURT,

MCLAUGHLIN,
Circuit Judge.

Dated: March 3, 1967.

STATUTORY PROVISION INVOLVED.

18 U. S. C. A. § 3500.

DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withhold-

ing and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

JOSEPH H. DONLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

THURGOOD MARSHALL,
Solicitor General,
FRED M. VINSON, JR.,
Assistant Attorney General,
BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1346

JOSEPH H. DONLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on January 17, 1967, and a petition for rehearing was denied on March 3, 1967. On April 7, 1967, Mr. Justice Brennan granted petitioner an extension of time to and including May 3, 1967, to file a petition for a writ of certiorari, "without prejudice to the Court's consideration as to whether the application was timely received." The petition was filed on May 3, 1967. However, since the request for an extension was not

received until more than 30 days after the denial of rehearing,[1] the petition is out of time under Rules 22-2 and 34-2 of the Rules of this Court.

In any event, the petition is without merit. After trial by jury, in the District of Delaware, petitioner was convicted of attempting to evade and defeat the excise tax that he owed under 26 U.S.C. 4401 on wagers accepted by him in the month of June 1964 (Count 1) and of failing to register and pay occupational tax imposed by 26 U.S.C. 4411 and 4412 (Counts 2 and 3) (R. 1b-2b).[2] He was given a sentence of one and one-half years on the first count and concurrent one year sentences on the other counts (R. 41a).

1. At the trial, five revenue agents testified to their surveillance of petitioner during the month of June 1964. Petitioner followed a routine which included a series of visits to various locations during the morning and on such visits was observed to deal with slips of paper or money. Although the surveillance was con-

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[1] The Clerk's files indicate that at 3:34 p.m. on April 3, petitioner sent a telegraphic request for an extension but that the telegram was not received until April 4, 1967. Petitioner asserts that the judgment of the court of appeals was dated and entered on March 29, 1967 (Pet. 2), but what was filed and entered on that date was merely a copy of the original judgment, entered in lieu of a mandate. In his formal motion for an extension, petitioner acknowledged that judgment was entered on his petition for a rehearing on March 3, 1967.

[2] Numbers followed by "b" refer to the government's appendix in the court of appeals. Numbers followed by "a" refer to petitioner's appendix in that court.

ducted during the months of May and June, the court, on petitioner's objection, limited the agents' testimony to the activities observed in June (R. 31b-33b, 34b, 37b).

Documents seized from petitioner pursuant to a search warrant were also introduced in evidence. A revenue agent named Toscano, who had participated in investigations of gambling activities along the entire east coast, testified as an expert that the documents so seized were of the type utilized by bankers in the numbers business as business records and gave his opinion as to the total amount of wagers represented by the notations (R. 11b-24b). On cross-examination, and later when called as a witness for petitioner, it was brought out that Toscano had participated in the surveillance of petitioner, although he had not testified concerning such surveillance on direct examination (R. 12a, 58b).

After the government produced various statements pursuant to 18 U.S.C. 3500, petitioner's counsel stated to the court that he was not satisfied and wanted "all memoranda having anything to do with the investigation and surveillance or anything with regard to the charges that are before us" (R. 35b). After considerable discussion (R. 42b-47b), petitioner indicated that he suspected that the government possessed memoranda by the witnesses reflecting an unsuccessful attempt by an informer named Italiano to place a bet with him by telephone (R. 48b-49b). The government objected that the incident had taken place during May (R. 49b-50b), but nevertheless produced all memoranda and notes relating to the incident to the court

(R. 51b-52b), which, after inspection, ruled that they were not producible (R. 54b). The government also had all of the other May surveillance reports available if the court wished to inspect them, but the court, ruling that only reports made of surveillances during June related to the subject matter of the witnesses' testimony, did not undertake to examine them.

These rulings were clearly justified. There is no support in the record for petitioner's conjecture that the government, despite its express denial (R. 57b), withheld relevant material from the trial court's *in camera* inspection. Since Toscano did not testify to the surveillance of petitioner at all on direct examination, having been called solely as an expert to explain the documents found in petitioner's possession, the district court need not even have examined—although it did—the reports concerning the Italiano incident; on petitioner's own version of the incident it had no relevance to Toscano's testimony. As for the other reports of the government agents concerning their surveillance of petitioner during May, petitioner, having successfully objected to any testimony by government witnesses concerning the surveillance in that month, can hardly claim that any report thereon qualified as a statement "which relates to the subject matter as to which the witness has testified." 18 U.S.C. 3500(b).[3]

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[3] Unlike *United States* v. *Chapman*, 318 F.2d 912 (C.A. 2), there was no issue in this case as to petitioner's identity that would have made all surveillance reports—even those

2. Two local police officers testified that initials and nicknames listed on the papers seized from petitioner "could represent" certain named individuals whom the officers knew to be numbers writers in the area (R. 3b-11b, 24b-28b). The jury was instructed to consider the witnesses' testimony only in relation to whether the named individuals were known to have engaged in the gambling business in general, and to disregard the witnesses' speculation that the individuals were specifically so engaged during the period charged in the indictment (R. 28a). Petitioner argues that this evidence was too speculative to be admissible. However, the testimony did tend to show that there were numbers writers known to the officers who had such initials or nicknames. As such, it had sufficient "rational connection with the issue" of whether the papers were in fact numbers banker records "to be considered a factor contributing to an answer." *United States* v. *Pugliese*, 153 F.2d 497, 500 (C.A. 2).

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reflecting surveillances that were not the subject of direct testimony—relevant to testing the accuracy of identification testimony by government witnesses.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.[4]

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys.

JUNE 1967.

[4] Unlike petitioners in *Marchetti* v. *United States*, No. 38, and *Grosso* v. *United States*, No. 181, this Term, petitioner here has not challenged the constitutionality of the wagering tax laws under which he was convicted—or preserved his right to do so by making such a challenge in the courts below.

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No. 798

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

DONALD J. ANGELINI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

DONALD J. ANGELINI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Donald J. Angelini, respectfully prays a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the case of United States of America, Libelant-Appellee, vs. United States Coin and Currency in the Amount of $8,674.00, Respondent, Donald J. Angelini, Claimant-Appellant, No. 15502.

The Findings of Fact, Conclusions of Law, and Judgment Order of the United States District Court for the Northern District of Illinois, Eastern Division, were entered on August 25, 1965. They are not reported, but ap-

pear in the printed appendix filed, and certified by the Clerk of the United States Court of Appeals for the Seventh Circuit as a part of the record and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming such judgment, was filed on June 27, 1967, and is not yet reported, but is set forth in petitioner's appendix hereto (*infra*, pages App. 1-4*), and in the certified copy of the record.

Petition for Rehearing was denied on August 9, 1967. No opinion was rendered on the Petition for Rehearing, and the Order denying such petition is not reported, but is set forth in the appendix hereto, (*infra*, pages App. 6) and in the certified copy of the record.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on June 27, 1967. On August 9, 1967, it was ordered that the Petition for Rehearing be denied. These orders appear in Petitioner's appendix hereto, (*infra*, pages App. 5-6). This petition is filed within 90 days of the denial of the Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

---

* "(App. .....)" refers to supplemental appendix, *infra*. "(A. .....)" refers to appendix filed in United States Court of Appeals for the Seventh Circuit.

QUESTIONS PRESENTED

1. Do not the federal wagering tax statutes here involved (and on the basis of which the respondent monies were declared forfeit) violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment?

2. Should not this court especially in view of its recent decision in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965) overrule *United States* v. *Kahriger*, 345 U.S. 22 (1953) and *Lewis* v. *United States*, 348 U.S. 419 (1955)?

STATUTES INVOLVED

"§4411. *Imposition of tax*

"There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. Aug. 16, 1954, c. 736, 68A Stat. 527."

"§4412. *Registration*

"(a) *Requirement.*—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

"(1) his name and place of residence;

"(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

"(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

"(b) *Firm or company.*—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

"(c) *Supplemental information.* — In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter. Aug. 16, 1954, c. 736, 68A Stat. 527."

"§4901. *Payment of tax*

"(a) *Condition precedent to carrying on certain business.*—No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), 4461(a) (1) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marihuana) until he has paid the special tax therefor.

"(b) *Computation.*—All special taxes shall be imposed as of on the first day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for 1 year, and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

"(c) *How paid.*—

"(1) *Stamp.*—All special taxes imposed by law shall be paid by stamps denoting the tax.

"(2) *Assessment.*—

"For authority of the Secretary or his delegate to make assessments where the special taxes have not been duly paid by stamp at the time and in the manner provided by law, see subtitle F.

Aug. 16, 1954, c. 736, 68A Stat. 593; June 21 1965, Pub.L. 89-44, Title IV, §405(b), 79 Stat. 149."

"§7302. *Property used in violation of internal revenue laws*

It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws. Aug. 16, 1954, c. 736, 68A Stat. 867."

STATEMENT OF THE CASE

On February 18, 1964, a libel was filed herein seeking to forfeit the respondent, $8,674.00, stating as a cause of action that from about August 1 to August 24, 1963, one Donald Angelini was operating a business in violation of Title 26, U.S.C., Section 4401, 4411, 4412, and 4901, and that on one or more of those dates between August 1 and August 24, 1963, the respondent monies had been used or were intended to be used in violation of the Internal Revenue Laws of the United States. It was further alleged in said libel that on August 24, 1963, the respondent monies were seized by agents of the United States Treasury Department. (A. 6)

On or about June 3, 1964, leave was given to Donald Angelini to intervene and file his claim and answer, which he did, claiming ownership of the respondent monies, and, answering the libel, admitted the seizure of the respondent monies from his person, and substantially denied all other allegations, including that the monies were forfeit to the United States of America. (A. 2)

On June 15 and 16, 1965, the case was heard by the Honorable Bernard M. Decker, sitting without a jury, and taken under advisement. (A. 3-4, 8-39)

On August 25, 1965, the Court entered its written Findings of Fact and Conclusions of Law and Judgment Order declaring the respondent monies forfeit to the District Director of Internal Revenue. (A. 40-42)

In essence the court found that from August 1 to 24 of 1963, there was being operated and conducted a bookmaking business in Sportman's Park, Cicero, Illinois, without payment of the occupational tax of $50.00 as required

by 26 U.S.C. 4411 and without registration with the District Director of Internal Revenue as required by 26 U.S.C. 4412; that, thus, the wagering business was being operated and conducted in violation of 26 U.S.C. 4901. The court also found, as a fact, that the respondent monies in the amount of $8,674.00 was being used in this bookmaking business and was an integral part of the business and was intended to be used in violation of the Internal Revenue laws. The court thus concluded that the said respondent monies were forfeit to the United States of America under the provisions of 26 U.S. 7302. (A. 40-41)

THE EVIDENCE

Between the dates, August 1 and 24, 1964, Internal Revenue had a vast surveillance for the purpose of observing wagering activities (other than pari-mutuals) at Sportmans Park Race Track in Cicero, Illinois, a town bordering on the western outskirts of Chicago. The claimant-petitioner, Donald J. Angelini was one of the persons who came within the orbit of that surveillance. There was no occasion upon which this petitioner is shown to have accepted any wagers. No Internal Revenue Agent made wagers with him (A. 23). Though agents were given money to make wagers at Sportmans, and though one Agent Potter was assigned to make wagers or attempt to make wagers with the petitioner, he never did so. (A. 30) Though the agents were given marked money for the purpose of making bets on August 24, and at least ten of them had the marked money, no marked money was recovered from Donald J. Angelini or is part of the respondent monies. (A. 31) However, Donald J. Angelini was seen in the course of the surveillance accepting money from some persons and giving money to other persons. Some of the persons to whom he gave money and some of those from whom

he accepted money during the month of August were in the wagering business. It is by association of the petitioner with those persons—some of whom had accepted wagers from Internal Revenue Agents—that this money was declared forfeit. (A. 8-28)

Arrest warrants issued for many of the persons under surveillance, petitioner Donald Angelini among them, and they were executed on August 24, 1963. When Mr. Angelini was served with the arrest warrant, he was taken to the United States Courthouse and there directed to empty his pockets. Included in the effects in his pockets were the respondent moneys. (A. 24) Also on his person were documents which an expert government witness testified were recap sheets. (A. 35-39) These recap sheets corresponded in some particulars with betting cards taken from another person arrested, one Joseph Altiere. (A. 34-39)

In the United States Court of Appeals for the Seventh Circuit the petitioner complained about the insufficiency and illegality of the evidence upon which the forfeiture rested and that the claimed statutory basis for forfeiture was unconstitutional and void.

The Court of Appeals for the Seventh Circuit rejected the claim of insufficiency and illegality, and on the constitutional issue ruled as follows:

> "The judgment below was based on two provisions of the wagering statutes requiring registration and payment of an occupational tax. The claimant urges that those provisions, namely, Sections 4411 and 4412 of the Internal Revenue Code (26 USC §§ 4411 and 4412), violate the privilege against self-incrimination contained in the Fifth Amendment. Knowing that the Supreme Court was reconsidering this question, we withheld releasing this opinion pending the outcome

of *Marchetti* v. *United States,* 385 U.S. 1000, and *Grosso* v. *United States,* 385 U.S. 810. However, at the close of its last Term, the Supreme Court restored those two cases to the docket for reargument during its October 1967 Term. Rather than delay this litigation further, we reject claimant's constitutional argument on the authority of *United States* v. *Kahriger,* 345 U.S. 22, and *Lewis* v. *United States,* 348 U.S. 419; but cf. *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70." (Op. 15502, pgs. 3-4)

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

I.

THE REQUIREMENTS OF THE WAGERING TAX STATUTE (26 U.S.C. 4411 AND 4412) ARE IN CONFLICT WITH THE CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION UNDER THE FIFTH AMENDMENT, AND THE SEIZURE AND FORFEITURE OF THE MONIES INVOLVED IN THIS ACTION FOR FAILURE TO COMPLY WITH THOSE UNCONSTITUTIONAL ACTS OF CONGRESS VIOLATE THE PROSCRIPTION AGAINST DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW, SINCE THE SEIZURE AND FORFEITURE CONSTITUTE THE EXERTION OF A FORBIDDEN POWER.

The decision of the United States Court of Appeals for the Seventh Circuit (*Infra,* App. 1-4) clearly recognizes that the issue presented by this petition will be resolved by this court's determination of the questions presented by *Marchetti* v. *United States* and *Grosso* v. *United States,* respectively numbers 2 and 12, October Term, 1967, of this Court. It expressly issued the opinion in this case only to avoid further delay in the litigation and in reliance on *United States* v. *Kahriger,* 345 U.S. 22 and *Lewis* v. *United States,* 348 U.S. 419, but recognized that those cases may have been overruled by this court's later decision in *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70.

We recognize the disposition of this cause will be determined by this court's ruling in *Marchetti* and *Grosso.* In fact, the questions presented on this petition are admittedly plagiarized from those presented in the *Marchetti* case.

This court has already had the very able argument of counsel in those cases. It would be an imposition to make this an extended petition, and it will not be.

We submit to this court, as it has already been submitted to this court, that the requirement that gamblers not only pay the federal wagering occupational tax, but also fill out a registration form such as Form 11-C clearly renders them vulnerable to state convictions for gambling in violation of the prohibition against self-incrimination under the Fifth Amendment. To comply with the requirements of Form 11-C is an induced confession to violations of state law. Certainly in the State of Illinois gambling is permeated with criminality and the registration requirements cannot be complied with without incrimination. See Chapter 38, Sections 28-1 through 28-3, Illinois Revised Statutes, 1961. But see particularly Section 28-4 of Chapter 38, of the Illinois Revised Statutes which reads as follows:

> "§ 28—4. Registration of Federal Gambling Stamps
>
> Every person who has purchased a Federal Wagering Occupational Tax Stamp, as required by the United States under the applicable provisions of the Internal Revenue Code, or a Federal Gaming Device Tax Stamp, as required by the United States under the applicable provisions of the Internal Revenue Code, shall register such stamp or stamps with the county clerk's office in which he resides and the county clerk's office of each and every county in which he conducts any business. Any person who violates this Section shall be fined not to exceed $200 or imprisoned in a penal institution other than the penitentiary not to exceed 6 months, or both. For each subsequent violation, such person shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. 1961, July 28, Laws 1961, p. 1983, § 28—4."

Thus, at least under Illinois law, the first invasion of the privilege against self-incrimination under 26 U.S.C. 4411 and 4412 becomes an unending prelude to further self-incrimination.

We have had the advantage of certain questions that were asked in the course of the hearing on the *Marchetti* case in this court. Particularly the following:

> "Mr. Justice Fortas: What would result if a person, a taxpayer, was asked by the federal government to answer the question 'Are you engaged in the business of accepting wagers of your own account?' Could a citizen refuse on Fifth Amendment grounds to answer such a question?"
>
> "Mr. Beytagh answered that there is a collision in such a circumstance between the Fifth Amendment and such a procedure." Crim. Law Reptr. 2034.

Particularly appropriate to the focus of Mr. Justice Fortas' question is the statement of this court in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 at page 78:

> "These cases involved questions to witnesses on the witness stand, but if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes."

One of the questions raised in the *Marchetti* case was whether the obligation to pay the special occupational tax required by 26 U.S.C. 4411 can be satisfied without filing the registration statement provided for by 26 U.S.C. 4412. While we are sure that this has been adequately covered in the arguments heretofore had before this court, we would interject that, by virtue of Form 11-C the interdependence of one statute upon the other has been established.

We especially refer the court to instruction number two on the back of Form 11-C, which so firmly ties in the payment requirement with the registration requirement as to make them one.

> "2. *When To File.—(a) First and Renewal Returns and Applications for Registry* — Form 11-C serves two purposes: (A) A special tax return and (B) an application for registry."

It is submitted that the same questions are presented to this court in this petition as the court is presently reviewing in *Marchetti* and *Rosso*, and we respectfully suggest that the questions here presented be considered by this court together with those cases.

CONCLUSION

Wherefore, for the above and foregoing reasons, this petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

ANNA R. LAVIN
RICHARD E. GORMAN
Attorneys for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

For The Seventh Circuit

SEPTEMBER TERM 1966—APRIL SESSION 1967

No. 15502
UNITED STATES OF AMERICA,
Libelant-Appellee,

v.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674.00,
Respondent,
DONALD ANGELINI,
Claimant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 27, 1967

Before KILEY, FAIRCHILD and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In this libel, the respondent money was seized under Section 7302 of the Internal Revenue Code (26 USC §7302) on the ground that it was being used in violation of the internal revenue laws. The money was seized from the person of Donald Angelini on August 24, 1963. In August 1963, Angelini was engaged in the business of accepting wagers at Sportsman's Park racetrack in Cicero, Illinois. His 1964 conviction for failing to pay the special occupational tax on wagers and for failing to register with the District Director of Internal Revenue (26 USC §§ 4411 and 4412) was affirmed by this Court

in *United States* v. *Angelini*, 346 F.2d 278 (7th Cir. 1965), certiorari denied, 382 U.S. 838. In that case, the evidence was summarized as follows (346 F.2d at p. 280):

> "on a number of occasions during the month of August 1963 the defendant was observed at Sportsman's Park, a Cicero, Illinois, race track, receiving money from persons with whom the government agents had placed wagers on the horse races being run. On these occasions he was observed making notations. A search, subsequent to his arrest at the track, revealed he had $8,674.00 on his person and documents identified by an expert witness as 'recap sheets' showing net gain or loss for wagering operations at the end of any particular race. On one of these sheets a column of figures designated by the letter 'R' corresponded exactly with a record of wagers seized from Joe 'Red' Altiere at the time of the latter's arrest. Altiere was one of the individuals with whom the government agents had placed wagers and who had been observed handling money to the defendant."[1]

Here the District Court found that the $8,674 was being used in this bookmaking business in violation of the internal revenue laws and consequently ordered forfeiture. On appeal, it is contended that the evidence was insufficient to sustain the judgment of forfeiture and that the underlying statutory provisions violate the self-incrimination clause of the Fifth Amendment.

In the prior *Angelini* case, the $8,674 found on claimant at the time of his arrest was an important link in the Government's evidence and one of the factors justifying an inference that he was engaged in the business of accepting wagers. Since the possession of the $8,674 was one of the elements supporting Angelini's conviction, he may be collaterally estopped from denying that the respondent

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[1]Altiere's wagering tax conviction was also affirmed. *United States* v. *Altiere*, 343 F.2d 115 (7th Cir. 1965), remanded, 382 U.S. 367.

money was an integral part of the bookmaking business being used in violation of the internal revenue laws. Cf. *Emick Motor Corporation* v. *General Motors Corp.*, 340 U.S. 558, 568-569. But even apart from the doctrine of collateral estoppel, an inference that this money was being used in illegal wagering was justified from the evidence in the forfeiture case itself. This record shows that Angelini was responsible for paying off bets taken by other members of the bookmaking ring. His "recap sheets" indicate that the dollar volume of this business was substantial. Angelini would obviously need enough money on hand to pay off the betting customers. As noted in *United States* v. *$2117.41*, 218 F.Supp. 351, 353 (W.D. Mo. 1963):

> "A sufficient amount of ready cash to meet the demands of the trade would appear to be a necessary and closely related implement or facility of the wagering business as here transacted on the streets and in public rooms of hotels."[2]

Under this ready cash theory, it was unnecessary for the Government to show that the respondent money was actually received by Angelini from bettors on August 24, 1963, the date of seizure.

In our view the Government made out a *prima facie* case before the District Court. It was reasonable to conclude from the "recap sheets" and other evidence that Angelini was participating in a bookmaking operation when arrested. The unusually large amount of cash scattered throughout his pockets was vital to his part in the wagering operation. Here the burden of persuasion had shifted to claimant. By standing mute, he failed to discharge that burden. His silence was strong confirmation of the charges. *Local 167*

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[2] See also *United States* v. *$4298.80*, 179 F.Supp. 251, 254 (D.Md. 1959).

v. *United States,* 291 U.S. 293, 298; *Stagner* v. *United States,* 197 F.2d 992, 994 (5th Cir. 1952). Although claimant now complains that some of this money may not have been used in his wagering business, he had ample opportunity to take the stand to explain what portion of the $8,674 was not so used.

The judgment below was based on two provisions of the wagering statutes requiring registration and payment of an occupational tax. The claimant urges that those provisions, namely, Sections 4411 and 4412 of the Internal Revenue Code (26 USC §§ 4411 and 4412), violate the privilege against self-incrimination contained in the Fifth Amendment. Knowing that the Supreme Court was reconsidering this question, we withheld releasing this opinion pending the outcome of *Marchetti* v. *United States,* 385 U.S. 1000, and *Grosso* v. *United States,* 385 U.S. 810. However, at the close of its last Term, the Supreme Court restored those two cases to the docket for reargument during its October 1967 Term. Rather than delay this litigation further, we reject claimant's constitutional argument on the authority of *United States* v. *Kahriger,* 345 U.S. 22, and *Lewis* v. *United States,* 348 U.S. 419; but cf. *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70.

The other points raised by claimant were disposed of in this Court's earlier *Angelini* opinion, and we decline to depart therefrom.

The judgment of the District Court is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Tuesday, June 27, 1967

Before

Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, JR., *Circuit Judge*

No. 15502
UNITED STATES OF AMERICA,
Libelant-Appellee,
v.
UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674.00,
Respondent,
DONALD ANGELINI,
Claimant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

IN THE UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Wednesday, August 9, 1967

Before

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

Hon. WALTER J. CUMMINGS, JR., *Circuit Judge*

No. 15502

UNITED STATES OF AMERICA,
Libelant-Appellee,

v.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674.00,
Respondent,

and

DONALD ANGELINI,
Claimant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Hereby Ordered by this Court that the petition for a rehearing of this cause be, and the same is hereby DENIED.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

DONALD J. ANGELINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 798

DONALD J. ANGELINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After petitioner was convicted in the United States District Court for the Northern District of Illinois for failure to register and pay the occupational tax on wagers,[1] a sum of $8,674, which he was carrying on his person at the time of his arrest, was forfeited under 26 U.S.C. 7302 as property intended for use in violation of the Internal Revenue Laws.[2] On ap-

---

[1] See *United States* v. *Angelini*, 346 F. 2d 278 (C.A. 7), certiorari denied, 382 U.S. 838.

[2] In pertinent part, 26 U.S.C. 7302 provides:

> It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal

peal from the judgment of forfeiture, petitioner challenged the constitutional validity of the underlying wagering tax laws on the ground that they violate his Fifth Amendment privilege against self-incrimination. The court of appeals, although recognizing that this issue was pending before this Court,[3] affirmed the judgment on the authority of *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419 (Pet. App. 4).

We agree with petitioner that the resolution of the self-incrimination issue in the pending cases may have a bearing upon the validity of the forfeiture in this case.[4] The basis of the libel is that the money was "property intended for use in violating the provisions of the internal revenue laws." This Court's determination as to whether the underlying tax statutes are or are not valid can thus affect the right to forfeit property intended for use in violation of such laws.

---

revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property.

[3] *Marchetti* v. *United States*, No. 2, this Term; *Grosso* v. *United States*, No. 12, this Term.

[4] Petitioner does not assert, it should be noted, the insufficiency of evidence point raised and resolved against him in the court of appeals (see Pet. App. 2-4).

Accordingly, it would seem appropriate to defer action on the present petition until the *Marchetti* and *Grosso* cases are decided.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1967.

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DONALD J. ANGELINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

ERWIN N. GRISWOLD,
Solicitor General,
FRED M. VINSON, JR.,
Assistant Attorney General,
BEATRICE ROSENBERG,
Attorney,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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No. 798

DONALD J. ANGELINI, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

This memorandum deals with the potential impact of the Court's recent decisions in *Marchetti* v. *United States,* No. 2, and *Grosso* v. *United States,* No. 12, decided January 29, 1968, on the instant case. Involved here was a forfeiture of money under 26 U.S.C. 7302 on the ground that it was property intended for use in violation of the internal revenue laws. In the government's brief in opposition filed in November 1967, we stated that a determination of the constitutional validity of the underlying statutes might have a bearing on the validity of the forfeiture. It is our present position that, under the decisions ren-

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dered January 29, 1968, which did not hold the wagering tax statutes unconstitutional, but barred criminal prosecution of those individuals who properly asserted the privilege against self-incrimination as a ground for non-compliance with the registration and return requirements of those statutes, the instant judgment of forfeiture of property should be allowed to stand.

1. The *Marchetti* and *Grosso* opinions are explicit in stating that the federal taxes on wagering as such are not invalid. Hence, when any person engages in the business of wagering without paying the occupational tax imposed by 26 U.S.C. 4411, or fails to pay the 10-percent excise tax imposed by 26 U.S.C. 4401, he is violating the internal revenue laws, even though he cannot, under the decisions, be criminally prosecuted for such violation as against a claim of self-incrimination. Thus, any property used in that wagering business is property used in violation of the internal revenue laws within the literal language of 26 U.S.C. 7302.

The enforcement of a forfeiture against property is not equivalent to a criminal prosecution against the individual, even though forfeiture proceedings are recognized as quasi-criminal. See *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693. The action is one *in rem* against the offending property which may, or may not, belong to the person who failed to pay the tax. Thus, in this very case, where the money forfeited was found on petitioner's person, it is immaterial whether the money was his or whether it belonged to some other person. Similarly, where an automobile is

forfeited because used in violation of the internal revenue laws, the guilt or innocence of the owner of the property is immaterial. *J. W. Goldsmith, Jr.-Grant Co.* v. *United States,* 254 U.S. 505; *United States* v. *Bride,* 308 F. 2d 470 (C.A. 9); *Interbartolo* v. *United States,* 303 F. 2d 34, 37 (C.A. 1). The action is directed against the property, not the individual.

An item of property, as such, obviously has no privilege against self-incrimination. The proof that the property was intended for use in wagering must depend on evidence apart from any required declaration in connection with payment of taxes. It is true that there must also be proof that no tax has been paid on the wagering business, but we do not believe that such proof can be said to violate the privilege against self-incrimination of the owner of the property to such an extent that forfeiture should be barred. Even in a civil action to collect taxes, it would be necessary to show that the taxes had not been paid. The *Marchetti* and *Grosso* decisions create no impediment to such civil actions. And, as noted above, in an action against the property it is immaterial whether the person whose property is seized is the one who is liable for the taxes. Hence, proof of non-payment of taxes in order to seize the property would not necessarily involve proof that a property owner had declined to incriminate himself. For this reason, we think forfeitures under the wagering tax statutes do not violate the principles of *One 1958 Plymouth Sedan* v. *Pennsylvania, supra,* or *Boyd* v. *United States,* 116 U.S. 616. In each of those cases, the

government's effort to sustain the forfeiture involved an affirmative violation of a constitutional privilege—in the *Plymouth* case by use, in the forfeiture proceedings, of evidence illegally seized, and in *Boyd* by requiring the production of allegedly incriminating private papers under a statute which permitted judgment against the defendant upon his failure to do so. Proof that no taxes have been paid by anyone with respect to the business in which the property is being used has no such direct relationship to an assertion of the constitutional privilege. It is too remote to be deemed a penalty against an individual when the action itself is against property which may or may not belong to the individual.

2. At the least, it seems to us that the distinction between an action against property and an action against the individual is sufficient to warrant a ruling that, if the *Marchetti-Grosso* decisions apply to forfeitures, they should apply only to forfeitures occurring after January 29, 1968, the date of those decisions. As the recent decisions of this Court on the retroactivity of new constitutional rules establish, that question must be determined by considering the purpose of the new standard, the reliance by law enforcement authorities on the old standard, and the effect on the administration of justice of a retroactive application of the old standard. *Stovall* v. *Denno,* 388 U.S. 293, 297; *Johnson* v. *New Jersey,* 384 U.S. 719; *Tehan* v. *Shott,* 382 U.S. 406; *Linkletter* v. *Walker,* 381 U.S. 618.

We have not pressed for a non-retroactive application of the *Marchetti-Grosso* decisions to criminal pro-

ceedings which have not yet become final because it seems to us that, where the effect of a new standard is to create a complete defense to a criminal prosecution, such a defense, if asserted, would be recognized by a court in which the case is still pending. That situation appears to us as qualitatively different from a purely prophylactic rule dealing with the exclusion of evidence. In the case of forfeiture proceedings, however, where no individual is charged with crime and no record of criminal conviction results, it seems to us that all the reasons of policy set forth in the above-cited opinions of this Court argue against giving retroactive effect to the *Marchetti-Grosso* holdings, at least in this limited respect.

There is no question that in seizing property for forfeiture on proof that it was being used in violation of the internal revenue laws, IRS agents have relied upon the prior decisions of this Court upholding the validity of the wagering tax statutes. *United States* v. *Kahriger,* 345 U.S. 22; *Lewis* v. *United States,* 348 U.S. 419. But the proof of wagering which they assembled in order to make out a case for forfeiture involves no violation of any constitutional privilege and is in no way affected by the change of law represented by the *Marchetti-Grosso* decisions. And, as explained above, while proof that no taxes had been paid on the business for which the property was being used was required, this element did not necessarily require proof that the owner of the property was himself the person required to pay taxes. To give retroactive effect to the *Marchetti-Grosso* opinions in

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IN THE

Supreme Court of the United States

..... TERM, 196—

No. 1024

EMILIO PIZZARELLO,

Petitioner,

—v—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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..... TERM, 196—

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EMILIO PIZZARELLO,

Petitioner,

—v—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari be granted to review the decision of the United States Court of Appeals for the Second Circuit, which affirmed a judgment of conviction entered by the United States District Court for the Southern District of New York, Marvin E. Frankel, J., after a jury trial for violations of 26 U.S.C. §§ 4401, 4411, 4412, 7203, 7262 and 7272.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is unreported and is reprinted in the appendix hereto (A. 1a). The opinions of the District Court on petitioner's motion to suppress and on petitioner's motion for reargument are unreported and are reprinted in the appendix hereto (5a-12a).

Jurisdiction

The judgment of conviction was entered in the District Court on May 10, 1966. The judgment of the Court of Appeals was entered on November 17, 1967. By order dated December 4, 1967, Mr. Justice Harlan granted an extension of time within which to petition for certiorari to January 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Whether the federal wagering tax statutes are unconstitutional as violating the Fifth Amendment privilege against self-incrimination.

2. Whether an uninvited entry by a federal agent of Petitioner's office-storage room after opening a closed door without a warrant or notice of his authority and purpose was illegal, and rendered illegal the observations then made and an arrest, search, seizure and statemen tof Petitioner based on said observations.

Constitutional Provisions Involved

United States Constitution

Amendment [*IV.*]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment [*V.*]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising

in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes Involved

18 U.S.C. § 3109. Breaking doors or windows for entry or exit.

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

The federal wagering tax statutes (26 U.S.C. §§ 4401, 4411, 4412, 7203, 7262 and 7272 are set forth in the appendix hereto (13a-15a).

Statement

In the Spring of 1965, Petitioner was the full time proprietor of a stationery store-luncheonette at 151 West Sanford Boulevard, Mt. Vernon, New York (97, 123, 411-12, Exhibit 6). It was divided into an area where business was done with the general public and a back room which served as a storeroom and Petitioner's office. The room contained his desk, cases of soda and food, a safe, a table, a wardrobe and a refrigerator. It was concededly not a part of the store where business was transacted with the general public (406-08, 411-13, 426-27, 439-43, 709-11, Exhibits A-N; opinion of Court below). Between March

30, 1965 and April 14, 1965, inclusive, a federal agent named Ripa made horse wagers with Petitioner on seven occasions in the office-storeroom in the back of the store. On these occasions he also saw others leave wagers with Petitioner (12-41), always between approximately 1:00 P.M. and 2:00 P.M. (71). Prior to Ripa's seventh visit on April 14, he recounted his experiences and described what he had observed to another agent named Riley. On April 14, Riley also observed Ripa enter the office-storeroom from the public portion of the store (400-08).*

On April 15, 1965, Ripa again left a wager with Petitioner in the back of the store and reported that fact to Riley outside the store at about 1:25 P.M. Ten minutes later Riley and other agents entered the store armed with a void arrest warrant (5a-12a) and Riley observed one unknown man go through the door to the back room (408-12).* At this point, though they had neither a valid arrest nor information that a felony was being committed (428-30), Riley and the other agents went behind the counters in the store, opened closed doors without knocking and entered the back room where Riley immediately arrested Emilio Pizzarello for a violation of the federal wagering tax laws as a misdemeanor (401, 413, 425-36, 5a-12a, 676-80, 737-38, Exhibits A-N). Riley had never placed a bet with Petitioner nor seen one placed (425). When he entered, he observed Mr. Pizzarello seated next to the desk talking to another man who was seated nearby (412-13). Two other men were standing in the room, one holding a scratch sheet and the other a newspaper open to the horse racing section. On the desk were

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*The decision of the Court of Appeals incorrectly states that "Riley observed agent Ripa and *several* others enter the backroom on the afternoon of April 15th" a few minutes before Riley entered and arrested petitioner. As the record shows, Riley only saw *one* person enter the office-storeroom on April 15 before Riley entered and Riley had seen Ripa enter on April 14, not April 15.

four National Programs, a few 3 x 5 white blank slips of paper and a few pencils (84-85, 412-13).

After the arrest, Petitioner was searched and the agents took $425, ten horse bet slips and a "payoff slip" (Exhibits 27-37, 413, 86, 156). At approximately 3:00 P.M., some agents removed Emilio Pizzarello from the premises (98) and took him to Manhattan where a stenographic statement was taken at 4:25 P.M. (291-93, 131, Exhibit 6). Thereafter, Petitioner was taken before the United States Commissioner and released on bail.

On August 19, 1965, an Information was filed charging petitioner with having wilfully failed to pay the special tax of $50 while engaged in the business of accepting wagers (count one) and having wilfully failed to register with Internal Revenue while engaged in the same business (count two). The charges alleged violation of 26 U.S.C. §§ 4401, 4411, 7203, and 7262 in count one and 26 U.S.C. §§ 4401, 4411, 4412, 7203 and 7272 in count two.

After a hearing on a motion to suppress in the trial court, Judge Thomas F. Murphy held that the warrant pursuant to which Petitioner had been arrested was invalid, but that the arrest was lawful on the theory that the arresting officer saw enough upon his uninvited entry into the office-storage room to give him adequate grounds for believing that a misdemeanor was being committed in his presence. The court overruled the contention that Riley had illegally entered the back room and denied the motion to suppress insofar as it related to the evidence taken at the time of the arrest as well as the statement taken three hours later (5a-12a).

A separate hearing was held to determine the admissibility of the statement. Petitioner again urged improper entry and illegal arrest as tainting the statement (698-836). Judge Marvin E. Frankel held that the statement was admissible (834-35), however, and it was also

received on the trial (132, Exhibit 6) along with the card, slips and some cash. The trial commenced on March 2, 1966 and concluded on March 5, 1966. The jury found appellant guilty of the two charges with a stipulation of non-wilfulness and judgment was entered on May 10, 1966.

Reasons for Granting the Writ as to the Contention that the Wagering Tax Statutes are Unconstitutional

The writ should be granted as to the contention that the federal wagering tax statutes are unconstitutional as violating the privilege against self-incrimination of the Fifth Amendment to the United States Constitution since this Court has recently granted writs of certiorari on this question on several previous occasions and has not rendered a decision in those cases. See, *e.g. Marchetti* v. *United States* and *Grosso* v. *United States*, 36 U.S.L. Week 3177 (October 31, 1967).

Reasons for Granting the Writ as to the Contention that the Entry of the Office-Storage Room and the Arrest were Illegal

1. This Court has repeatedly held that evidence obtained by means of a trespass and other invasions of privacy may not be used as a basis for a lawful arrest. See, *e.g.*, *Wong Sun* v. *United States*, 371 U.S. 471, 485 (1963); *Silverman* v. *United States*, 365 U.S. 505 (1961); *Katz* v. *United States*, U.S. Sup. Ct., Dec. 18, 1967. It is thus crucial to the adjudication of cases arising under the Fourth Amendment and to the supervision of federal agents engaged in law enforcement that trespass and invasion of privacy be clearly defined and the tests therefor clearly delineated.

In the instant case, the Court of Appeals neither formulated a test nor applied the correct test to determine if a trespass had occurred. That test is whether one person

has made an unauthorized entry on the property of another. An unlawful intent is not necesasry. *MacDonald* v. *Parama, Inc.*, 15 A.D. 2d 797, 224 N.Y.S.2d 854 (2d Dep't 1962); *Semble Silverman* v. *United States, supra.* Again, a trespasser is defined as "a person who enters upon the premises of another without invitation, express or implied, and does so out of curiosity or for his own purpose or convenience and not in the performance of any duty to the owner." *Mendez* v. *Goroff*, 25 M. 2d 1013, 203 N.Y.S.2d 568, 571 (Sup. Ct. 1960), *aff'd*, 13 A.D.2d 705, 214 N.Y.S.2d 580 (2d Dep't 1961).

In the instant case, there was, of course, no express invitation to Agent Riley by Petitioner to enter the room. They had never met. Nor was there an implied invitation insofar as Riley embodied one of the general public. The room was not and could not be open to the general public since it housed activity contrary to both New York and Federal Law. That the office-storeroom, tucked away behind the counters was not open to the general public and that a sign would have been superfluous was also evident by a mere glance at photographic exhibits A-N. By any view, it is clear that, like the Petitioner in the *Katz* case, *supra*, Petitioner intended his conduct in the room to be concealed from the public and the Government so conceded on the trial (321-321a). As a result, the Court of Appeals had to concede that the room was not open to the public at large, stating that ". . . this room was not 'public' to the same degree as the luncheonette."

Insofar as the invitees necessarily were a class more limited than the general public, the most probable common denominator was the ability to pass a screening test of some sort. See, *e.g.*, *People* v. *Lawery*, 43 M. 2d 1084, 252 N.Y.S.2d 823 (Crim. Ct. 1964). At the very least, all of the class would be willing to place wagers. But whatever the limitations and qualifications of the invitees, it is clear that Agent Riley, who went there for the exclusive purpose of arresting Petitioner, was not included and seeing one invitee precede him into the room could not alter the fact.

The only way in which that concededly limited group of invitees could have been defined in a way large enough to include Agent Riley would have been to defy the principal of contradiction and erroneously define it as unlimited, *i.e.*, including "any person who had the inclination to enter." The Court of Appeals did so, misapplied the law of trespass, and contravened this Court's decisions in the *Katz*, *Wong Sun* and *Silverman* cases, *supra*.

2. It is settled that a peace officer, whether he arrests by virtue of a warrant or by virtue of his authority to arrest without a warrant, may not "break open" a door in a house unless admittance has been refused after notice of his authority and purpose for demanding admission. *Miller* v. *United States*, 357 U.S. 301 (1958); 18 U.S.C. § 3109.

In the court below, it was not disputed that the arresting officer failed to comply with the rule before entering the room where he arrested Petitioner or that the room constituted part of a "house" within the meaning of Section 3109. Neither was it questioned that evidence seized after an entry that offends the statute must be suppressed. Rather, the Government correctly urged that the law in the Second Circuit is that Section 3109 only requires the announcement of authority and purpose when entry is made forcibly and that the words "break open" in the statute do not apply to a "peaceable" (though unauthorized) entry, of the kind made by Agent Riley. *United States* v. *Conti*, 361 F.2d 153, 157 (2d Cir. 1966); *United States* v. *Garnes*, 258 F.2d 530, 533 (2d Cir.), *cert. denied*, 359 U.S. 957 (1958). This construction of the statute is not only in conflict with the traditional common law definition of "breaking" as any unauthorized opening, but also conflicts with decisions of the Court of Appeals for the District of Columbia, the Ninth Circuit and the Fourth Circuit which have held that even peaceful entry is forbidden unless it is by consent. See *Keiningham* v. *United States*, 287 F.2d

126 (D.C. Cir. 1960); *Hair* v. *United States*, 289 F.2d 894 (D.C. Cir. 1960); *United States* v. *Mullin*, 329 F.2d 295 (4th Cir. 1964); *Munoz* v. *United States*, 325 F.2d 23 (9th Cir. 1963). See also, *United States* v. *Sims*, 231 F. Supp. 251 (D. Md. 1964); *United States* v. *Poppitt*, 227 F. Supp. 73 (D. Del. 1964).

The decision of the Court of Appeals in the instant case does not make specific reference to the contention that Agent Riley's entry violated Section 3109, but as indicated by the last paragraph, the point was considered on the merits. This Court should accept jurisdiction on this point both because of the inherent importance of the question in the administration of the Federal criminal laws and in order to resolve the conflict between the various Courts of Appeals.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES G. STARKEY,
Counsel for Petitioner.

January 11, 1968.

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Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 89—September Term, 1967.

(Argued October 6, 1967 Decided November 17, 1967.)

Docket No. 30658

UNITED STATES OF AMERICA,

Appellee,

—v.—

EMILIO PIZZARELLO,

Appellant.

Before:

FRIENDLY, HAYS and ANDERSON,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Marvin E. Frankel, *Judge,* convicting appellant, after jury verdicts of guilty, of violations of the federal wagering tax laws, 26 U. S. C. §§ 4401, 4411, 4412, and related sections. Affirmed.

JAMES G. STARKEY, Esq., Brooklyn, N. Y., *for Appellant.*

LAWRENCE W. NEWMAN, Assistant U. S. Attorney, Southern District of N. Y. (Robert M. Morgenthau, U. S. Attorney, Douglas S. Liebhafsky and Pierre N. Leval, Assistant U. S. Attorneys, Southern District of New York, on the brief), *for Appellee.*

Opinion of Court of Appeals

PER CURIAM:

An information was filed against Emilio Pizzarello, charging him in two counts of engaging in the business of accepting wagers without paying the special wagering tax, 26 U. S. C. §§ 4401, 4411, 7262, and without registering with the District Director of Internal Revenue, 26 U. S. C. §§ 4401, 4412, and 6262. A jury returned verdicts of guilty, without wilfulness, on both counts and from the judgments of conviction entered thereon, he now appeals.

The principal issue which he presents to this court is whether or not he was illegally arrested. At the pre-trial proceeding the warrant which Agent Riley possessed was held invalid but the validity of the arrest, and the seizure of cash and bet slips found in the appellant's possession were sustained.

In the absence of a valid warrant, an agent of the Internal Revenue Service is authorized to make an arrest for a misdemeanor related to the revenue laws which is "committed in his presence." 26 U. S. C. § 7608(b)(2)(B). Prior to the effective date of that section, this court interpreted a similar statutory authorization contained in § 183 of the New York Code of Criminal Procedure as sanctioning an arrest without a warrant in cases where the observations of the arresting agent are sufficient to induce a reasonable belief that a crime is then and there being committed. *United States* v. *Viale*, 312 F. 2d 595 (2 Cir.), *cert. denied*, 373 U. S. 903 (1963). We see no valid reason why a like construction should not be given the federal statute.

On March 30, 1965, and on seven separate occasions thereafter, including the afternoon of April 15th shortly before the arrest, Riley's fellow Internal Revenue Agent, Ripa, had placed horse race wagers with the appellant in

the back room of Pizzarello's combination luncheonette-stationery store. On each of his visits he observed others there reading scratch sheets or racing programs, writing on slips of paper, and handing these slips along with sums of money to Pizzarello. He had fully recounted these experiences and described what he had observed to Agent Riley, who had been assigned to the case with him. Riley observed Agent Ripa and several others enter the back room on the afternoon of April 15th and Riley himself entered the back room a few minutes later and found Pizzarello, with another man, seated at a desk covered with betting slips, pencils, and scratch sheets. Two men were standing around reading racing forms. What he then observed and what he had been told by his fellow agent, Ripa, furnished reasonable grounds for him to believe that gambling activities were going on. See *United States* v. *Comi*, 336 F. 2d 856, 858 (4 Cir. 1964), *cert. denied*, 379 U. S. 992 (1965); cf., *United States* v. *Elgisser*, 334 F. 2d 103, 110-111 (2 Cir.), *cert. denied*, 379 U. S. 881 (1964). Under these circumstances the arrest was clearly lawful and evidence seized in the search incidental thereto was admissible. *Ker* v. *State of California*, 374 U. S. 23, 41 (1963).

Appellant argues that Agent Riley's observations in the storeroom were the product of a trespass and therefore could not provide the basis for the arrest. Although this room was not "public" to the same degree as the luncheonette, it was obviously open to any person who had the inclination to enter. Agent Ripa had done so on many occasions. On the day of the arrest others were seen going from the luncheonette through a swinging door to the back room without knocking or waiting for permission to enter. There was no sign on the door and no objection was made

when Riley entered. This case is clearly distinguishable from *People* v. *Lund*, 50 Misc. 2d 589, 271 N. Y. S. 2d 164 (Crim. Ct. 1966) on which appellant relies.

We have carefully considered appellant's other contentions, and find them without merit.[1] The judgments are affirmed.

[1] One issue of substance raised by appellant is the constitutional question. However, we refrain from discussing it in view of the fact that it is presently before the Supreme Court in *Marchetti* v. *United States* and *Grosso* v. *United States*, 36 U.S.L. Week 3177 (October 31, 1967), and adhere to the position taken by this court in many cases in which it has refused to find the statute unconstitutional.

Opinion Re Motion to Suppress

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Cr. 729

UNITED STATES OF AMERICA,

—against—

EMILIO PIZZARELLO,

Defendant.

MURPHY, D. J.

This is a motion to vacate a warrant of arrest and to suppress evidence.

It is the defendant's claim that the warrant of arrest should be vacated and set aside on the ground that the affidavit in support of it was insufficient and that the evidence that was taken as a result of the arrest should be suppressed on the ground that the arresting officer, assuming the warrant was invalid, did not, under New York law, see the commission of any misdemeanor; and, assuming both arguments are overruled, that $123,017 taken from a safe three hours after defendant's arraignment and $2440 discovered at the same time should be returned as not being the proper subject of a seizure and which neither was or (sic) could be the instrumentality of a crime.

Judge Wyatt has held invalid two identical warrants based on identical affidavits, Tripodi v. Morgenthau, M-18-65 (S.D.N.Y. May 10, 1965); Nannariello v. Morgenthau, M-18-65 (S.D.N.Y. April 28, 1965); the government claims that a subsequent Supreme Court case, Jaben v. United States, 381 U.S. 214 (1965), vitiates Judge Wyatt's

holding and, secondly, that Judge Wyatt was in error even under the old case law.

We conducted a hearing on the assumption that the warrant was invalid and both parties agreed to this procedure.

We agree with the defendant that the complaint upon which the warrant of arrest was issued does not meet the "probable cause" standard required by Rule 4(a). Giordenello v. United States, 357 U.S. 480 (1958); Aguilar v. Texas, 378 U.S. 108 (1964). Jaben v. United States, 381 U.S. 214 (1965) does not fashion any new or different rule. In fact it reaffirms "that a magistrate is intended to make a neutral judgment that resort to further criminal process is justified. A complaint must provide a *foundation* for that judgment. It must provide the affiant's answer to the magistrate's hypothetical question, 'what makes you think that the defendant committed the offense charged?" . . . It simply requires that enough information be presented to the Commissioner to enable him to make the judgment that the charges are not capricious and *are sufficiently supported* to justify bringing into place the further steps of a criminal process." Id. at 224-25. (Emphasis added.)

The instant complaint merely accuses the defendant in the words of the statute, i.e., "on or about the 14th day of April, 1965, in the Southern District of New York (the defendant) was engaged in the business of accepting wagers (or) in receiving wagers for and on behalf of the person engaged in the business of accepting wagers unlawfully, wilfully and knowingly failed to pay the special tax imposed by Title 26 U.S.C. § 4411."

As a basis for this charge, which by itself obviously would be insufficient, it gave the following information to the commissioner for him to make a judgment that the charges were not capricious and were sufficiently supported. The commissioner was told (1) that the agent had made investigations in his official capacity; (2) that another agent had made a statement that he had placed wagers with the

defendant, and (3) that a search of official records disclosed that the defendant failed to pay the tax.

In our opinion it was impossible for the commissioner to make a judgment that the charges were not capricious because he was furnished no information that supported the charges. He was not told one word about what investigations the affiant had made and whether they concerned this defendant. He was not told when the other agent had placed wagers or where and under what circumstances or how many, so that one could infer that the defendant was engaged in the *business* of accepting wagers or in receiving wagers for and on behalf of a person in the *business* of accepting wagers so as to exclude purely social or friendly type of wagers. Cf. United States v. Simon, 241 F.2d 308, 310 (7th Cir. 1957).

The federal crime is the wilful failure to pay the special tax, but the agent furnished no supporting information that the special tax was due. Lastly, the commissioner could very well have asked, since there was no supporting information, how an official record could be searched when the agent had neither the name nor the address of the defendant. The affidavit merely described the defendant as John Doe No. 1, a white male approximately 45 to 50 years of age, 5′ 10″ tall, 180 lbs., stocky build, thin grey mustache, grey black hair.

Accordingly, we agree with Judge Wyatt and the warrant of arrest is vacated.

The arresting officer (not the one who made the return on the warrant) testified that he had been informed by an undercover agent who had made two bets with the defendant on the day before, viz., April 14, 1965, what the defendant looked like, where he sat in the back room of a luncheonette, how racing forms would be available at the desk where the defendant sat and how slips of 3″ x 5″ paper were available upon which the bettor was made to write out his bet and how other people would be standing

around reading racing forms and newspapers opened to the racing news.

Briefed with this information he entered the back room of the luncheonette and saw the defendant sitting at a desk and another man sitting in front of him, the various racing forms and small slips of paper and, accordingly, arrested the defendant. He later testified he knew that defendant had not paid the tax because the official records disclosed only one person, not the defendant, had paid the tax. He took some $425 from his person and some betting slips. When a safe was discovered behind some cartons in the rear of the room the defendant professed that it was not his safe but his sister's and she was in California at some unknown place and he did not know the combination. Other people were arrested and all were brought to this courthouse for arraignment. About 6:30 P.M. (three hours later) the Treasury Department had a locksmith open the safe and a large sum of money ($123,017) was found in it, mostly in $100 bills, and this was seized, and also during this latter search an agent found $2440 and three bundles of bets wrapped up in racing forms concealed under the lip of a table. It was his testimony that these bets related to the dates just preceding the arrest and corresponded to races that were held on those respective dates.

The warrant being vacated the next issue is whether under these facts the arresting officer as a "private person" saw the defendant commit or attempt to commit a misdemeanor in his presence. N.Y. Code of Criminal Procedure, § 183; United States v. Viale, 312 F.2d 595 (2d Cir. 1963).

In *Viale* the arresting officer was held to have had reasonable cause to believe that Fino and Pinavia, who were using telephones when the agents entered the room, were engaged in the business of accepting wagers illegally since the agents knew that no one from those premises had paid the tax or registered or filed a return. It is pointed out that the agents knew from undercover agents that Viale

and confederates were engaged in the business of accepting wagers. On entering they saw the defendants, Fino and Pinavia, in a second floor room equipped with four telephones, betting slips, racks and other paraphernalia appropriate for a wagering hideout. What was being said on the telephone does not appear, nor are the racks or other paraphernalia further described.

Since the Court of Appeals found it *easy* to hold that the arresting agent had reasonable cause to believe that the appellants were engaged in the business of accepting wagers illegally we, too, find that this defendant was engaged in the business of accepting wagers illegally but, admittedly, we do not make the finding as easily as the Court of Appeals did in *Viale*. We can readily equate a back room of a luncheonette with a second floor room in *Viale* and following the example of *Viale* find that the position of the defendant at the table, the presence of the 3" x 5" slips, the presence of racing forms, the presence of other men with newspapers opened at the racing news, are in essence the equivalent of the presence of racks and other paraphernalia. In total, therefore, just the telephones are missing and that seems to be unimportant, or at least not too important, since in *Viale* we were not told what was being said.

We hold, accordingly, that the arresting agent as a private citizen must have perceived indications of the commission of an offense sufficient to induce reasonable belief of the fact. He was aware at that time of the commission of a crime—a misdemeanor.

This holding only solves some of the problems, viz., that the arrest, the search of defendant's person, the seizure of the $425 in cash and the ten betting slips were legal and incidental to a lawful arrest. But the search was more extensive and productive.

As we said above, some three hours after the defendant has been arraigned further searches were conducted result-

ing in seizure of $123,017 in currency which was taken from a locked safe and $2440 plus betting slips which were found secreted under a table. These seizures we hold were illegal, Preston v. United States, 376 U.S. 364 (1964), and most recently James v. Louisiana, 34 U.S.L. Week 3131 (U.S. October 19, 1965), and may not be used in evidence against the defendant.

But the defendant asks for further relief, viz., not only the suppression but the return of this illegally seized evidence. We have no problem with the money and the slips found on defendant's person and deny so much of the motion out of hand. Abel v. United States, 362 U.S. 217 (1960). As to the rest it is the government's claim that even if the balance was illegally seized it cannot be returned because § 7302 of Title 26 U.S.C. declares them to be forfeited. That section provides, "It shall be unlawful to have or possess any property intended for use in violating the provisions of the Internal Revenue laws . . . or which has been so used, and no property rights shall exist in any such property." We see no difficulty in holding that the $2440 and the betting slips all bound together and secreted under the table can be held, at least for this motion, to be within § 7302 but have trouble, because of the absence of any facts, as to the money taken from the safe. We are not told who owns it, how it was used or why it was in the safe. But at this juncture on this motion we will honor the claim of the government that it is subject to forfeiture and relegate the defendant or the owner, if it is a different person, to the remedies provided by law. See §§ 7323, 7327 of Title 26; United States v. Grossman, 315 F.2d 94 (2d Cir. 1963); United States v. $1,058 in U.S. Currency, 323 F.2d 211 (3d Cir. 1963). Accordingly, that part of defendant's motion seeking the return of such moneys is denied but on condition that the government commence a libel for its forfeiture on or before November 1, 1965. As to defendant's motion to suppress certain un-

described oral admissions or statements made by defendant at the time of his arrest it is denied because it is premature. United States v. Klapholtz, 230 F.2d 494, (2d Cir. 1956), cert. denied, 351 U.S. 924.

This is an order. No settement is necessary.

THOMAS F. MURPHY
U. S. D. J.

Dated, New York, N. Y., October 25, 1965.

Opinion Re Motion to Reargue

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Cr. 729.

UNITED STATES OF AMERICA,

—against—

EMILIO PIZZARELLO,

Defendant.

Memorandum

MURPHY, D. J.

The cross motions to reargue, both dated October 28, 1965, are granted and on reargument our decision of October 25, 1965, is adhered to.

Defendant's post-decision argument that there was a trespass is not supported by the testimony nor was it even suggested by cross-examination.

The government's argument that the discovery of the money in the safe and the additional money and betting slips was one hour after defendant's arraignment, and not three as we held, might very well be the fact, which we accept, but 6:30 P.M. was five hours after defendant was arrested by Agent Riley and some three hours after he had been removed from the premises. This time spread and defendant's absence, in our opinion, makes Preston v. United States, 376 U.S. 364 (1964) controlling.

These are orders. No settlements are necessary.

/s/ THOS. F. MURPHY,
U. S. D. J.

Dated, New York, N. Y., November 4, 1965.

Wagering Tax Statutes

26 U.S.C. § 4401.

§ 4401. *Imposition of Tax.*

(a) *Wagers.*

There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) *Amount of wager.*

In determining the amount of any wager for the purpose of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer established, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) *Persons liable for tax.*

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him. . . .

Wagering Tax Statutes

26 U.S.C. § 4411.

§ 4411. *Imposition of tax.*

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. . . .

26 U.S.C. § 4412.

§ 4412. *Registration.*

(a) *Requirement*

Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

26 U.S.C. § 7203.

§ 7203. *Willful failure to file return, supply information, or pay tax.*

Any person required under this title to pay an estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than

a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. § 7262.

§ 7262. *Violation of occupation tax laws relating to wagering—failure to pay special tax.*

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000,

26 U.S.C. § 7272.

§ 7272. *Penalty for failure to register.*

Any person (other than persons required to register under subtitle E, or persons engaging in a trade or business on which a special tax is imposed by such subtitle) who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50.

SUPREME COURT, U. S.

FEB 14 1968

ERWIN N. GRISWOLD, CLERK

No. 1024

In the Supreme Court of the United States

OCTOBER TERM, 1967

EMILIO PIZZARELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.



In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1024

EMILIO PIZZARELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The judgment of the court of appeals was entered on November 17, 1967. The opinion below (Pet. App. 2a–4a) is not yet reported. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to January 16, 1968, and the petition was filed on January 15, 1968.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of an indictment charging him with engaging in the business of accepting wagers without paying the federal wagering tax and without registering with the District Director of Internal Revenue. On May 10, 1966, petitioner was

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fined $4,000 on the first count and a penalty of $50 was imposed on the second count. The court of appeals affirmed.

Petitioner asserts here, as he did in the court below, that the federal wagering tax statutes and the related registration requirement (26 U.S.C. 4401, 4411, 4412) violate his Fifth Amendment privilege against self-incrimination. In *Marchetti* v. *United States,* No. 2, this Term, decided January 29, 1968, this Court concluded that the wagering occupational tax statute and the related registration provision "may not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination." In *Grosso* v. *United States,* No. 12, this Term, also decided January 29, 1968, the Court reached the same result with respect to the wagering excise tax.[1] Petitioner appears to have properly asserted the Fifth Amendment in defense of his failure to comply with the wagering tax laws. It was for that failure that he was convicted. Accordingly, we suggest that the petition for a writ of certiorari be granted, that the decision of the court below be vacated and the case re-

[1] Because of the pendency of *Marchetti* and *Grosso* in this Court, the court of appeals refrained from discussing petitioner's privilege against self-incrimination claim and adhered to its previous position that the wagering tax laws were not unconstitutional (see Pet. App. 4a, n. 1).

manded for reconsideration in light of the *Marchetti* and *Grosso* decisions.[2]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1968.

[2] In view of the relevance of the Court's decisions in these cases, it appears unnecessary to discuss petitioner's further contention (Pet. 6–7) that his arrest was unlawful.

U.S. GOVERNMENT PRINTING OFFICE: 1968

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

STONE *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 9. Decided March 4, 1968.*

PER CURIAM.

The petitions for writs of certiorari are granted, the judgments of the courts below are vacated and the cases are remanded for further consideration in the light of *Marchetti* v. *United States*, 390 U. S. 39, and *Grosso* v. *United States*, 360 U. S. 62.

MR. JUSTICE MARSHALL took no part in the consideration or decision of Nos. 9, 14, 77, and 121.

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*Together with No. 14, *Conti et al.* v. *United States*; No. 77, *Ross* v. *United States*; No. 121, *Donlon* v. *United States*; No. 798, *Angelini* v. *United States*; and No. 1024, *Pizzarello* v. *United States*, all on petitions for writs of certiorari. No. 77 is to the United States Court of Appeals for the Sixth Circuit, Nos. 14 and 1024 to the Second Circuit, and No. 121 to the Third Circuit.